Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1247

BOARD OF TRADE OF THE CITY OF CHICAGO,
Petitioner,

vs.

COMMODITY FUTURES TRADING COMMISSION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Petitioner, the Board of Trade of the City of Chicago ("Board of Trade"), prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this cause on September 12, 1979.

OPINIONS BELOW

The Opinion of the Seventh Circuit is reported at 605 F. 2d 1016, and is reproduced as Appendix A. The March 19, 1979 Order of the Seventh Circuit denying respondent's request for a stay pending appeal is not officially reported. It is unofficially reported at Commerce Clearing House *Commodity Futures Law Reporter,* paragraph 20,781, and is reproduced as Appendix B. The Opinion and Order of the trial court, the United States

District Court for the Northern District of Illinois, is not officially reported. It is unofficially reported in Commerce Clearing House *Commodity Futures Law Reporter,* paragraph 20,780, and is reproduced as Appendix C.

JURISDICTION

The judgment of the Seventh Circuit from which review is sought was entered on September 12, 1979. A timely petition for rehearing was denied on November 15, 1979. This Court's jurisdiction is invoked under 28 U. S. C. § 1254(1).

QUESTION PRESENTED FOR REVIEW

Whether an "emergency" order issued by the Commodity Futures Trading Commission under section 8a(9) of the Commodity Exchange Act [7 U. S. C. § 12a(9)] terminating trading in a futures contract is immune from judicial review, even when an "emergency" as expressly defined in that section can be shown not to exist.

STATUTES AND CONSTITUTIONAL PROVISION INVOLVED

I. Commodity Exchange Act, § 8a(9) [7 U. S. C. § 12a(9)]:

[The Commission is authorized:]

(9) to direct the contract market *whenever it has reason* to believe that an emergency exists, to take such action as, in the Commission's judgment, is necessary to maintain or restore orderly trading in, or liquidation of, any futures contract. *The term "emergency" as used herein shall mean, in addition to threatened or actual market manipulations and corners, any act of the United States or a foreign government affecting a commodity or any other major market disturbance which prevents the market from accurately reflecting the forces of supply and demand for such commodity;* Provided, That nothing herein shall be

deemed to limit the meaning or interpretation given by a contract market to the terms "market emergency", "emergency", or equivalent language in its own bylaws, rules, regulations, or resolutions. [As added by Act of October 23, 1974 (Commodity Futures Trading Commission Act of 1974), effective April 21, 1975, Sec. 215, 88 Stat. 1040.] (Emphasis added).

II. Administrative Procedure Act, 5 U. S. C. §§ 701(a) and 706:

[§ 701(a). Application.] This chapter applies according to the provisions thereof, except to the extent that—

(1) statutes preclude judicial review; or

(2) agency action is committed to agency discretion by law.

[§ 706. Scope of review.] To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. *The reviewing court shall—*

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) *hold unlawful and set aside agency action, findings, and conclusions found to be—*

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error. [Pub. L. 88-554, Sept. 6, 1966, 80 Stat. 393] (Emphasis added).

III. U. S. Constitution, Amendment 5:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor *be deprived of life, liberty, or property, without due process of law;* nor shall private property be taken for public use, without just compensation. [Emphasis added].

STATEMENT OF THE CASE

A. The Challenged Action

The Board of Trade brought this case pursuant to 28 U. S. C. sections 1331 and 1337 to obtain judicial review under the Administrative Procedure Act [5 U. S. C. §§ 701-706] of an order issued by the Commodity Futures Trading Commission ("Commission") invoking section 8a(9) of the Commodity Exchange Act. The Commission's order, issued without prior notice or opportunity for hearing, abruptly terminated trading in March 1979 wheat futures contracts on the Board of Trade and compelled settlement of all outstanding contracts at a price fixed unilaterally by the Commission.

B. The Petitioner

The Board of Trade, a voluntary membership association, is a designated "contract market" licensed by the Commission under the terms of the Commodity Exchange Act [7 U. S. C. § 1 *et seq.*]. The Board of Trade is the largest commodity exchange in the world, and thousands of producers and commercial users of commodities avail themselves of its markets. In 1979, almost 34 million futures contracts were traded on the Board by its members and the public. This constituted over 45 per cent of all futures trading in the United States.

Futures contracts traded on the Board of Trade, in addition to Wheat, include: Commercial Paper; Corn; GNMA Certificates; Gold; Iced Broilers; Oats; Plywood; Silver; Soybeans; Soybean Oil; Soybean Meal; and U. S. Treasury Bonds and Notes. Trading, in all instances, is subject to the regulatory oversight of the Commission, including the proper exercise of its authority under section 8a(9).[1]

Futures markets are "a very important part of our economy, providing an indispensable tool for agricultural producers, manufacturers, exporters, and consumers". [Sen. Rep. No. 93-1131, 93d Cong., 2d Sess. 20 (1974)]. Futures contracts allow producers, manufacturers and consumers of commodities, such as farmers, millers, exporters and livestock raisers, to protect their prices and supply of grain and to shift the risk of price fluctuations to willing investors. In addition, prices quoted at the Board of Trade and other contract markets are disseminated throughout the world and are used both within the United States and in scores of other countries in connection with the pricing of commercial transactions.

1. The nature, function and economic importance of the Board of Trade have been described by the Court in *Board of Trade of the City of Chicago* v. *Christie Grain & Stock Co.*, 198 U. S. 236, 245, 247-49 (1905); *Board of Trade of the City of Chicago* v. *United States*, 246 U. S. 231, 235-236 (1918); and *Board of Trade of the City of Chicago* v. *Olsen*, 262 U. S. 1, 33 (1923).

The Board of Trade's wheat contract—like all futures contracts—is standardized as to every term except price. Each contract calls for delivery of 5000 bushels of wheat, of defined grade, during a designated period of time at either Chicago or Toledo, Ohio. Each contract has a previously determined expiration date. Sellers and buyers must either offset their contractual obligations before this date by trading on the exchange, or make or take delivery of the actual grain. The contract involved in this case, March 1979 wheat, began trading in March of 1978 and was scheduled to cease trading on March 21, 1979, as required by Board of Trade rules and Commission Regulation § 100.1 (17 C. F. R. § 100.1).

C. The Commodity Futures Trading Commission

The Commodity Futures Trading Commission ("Commission") is one of the newest administrative agencies of the United States. Founded in 1974 and beginning operations in 1975, the Commission succeeded to the regulatory duties of the Commodity Exchange Act that had theretofore been performed by the Commodity Exchange Authority ("CEA"), a bureau within the U. S. Department of Agriculture. The Commission was formed, in part, because the CEA had grown "geriatric." [H. Rep. No. 93-975, 93d Cong., 2d Sess. 42 (1974)]. The CEA had not been vested with the "emergency" powers embodied in present section 8a(9) of the Act. Thus, a new Commission and a new power came into existence simultaneously. Congress took the precaution, however, to call for a complete review of the Commission's activities four years later, in 1978.

D. Events Leading to This Controversy

On the evening of March 15, 1979, four trading days before expiration of the March wheat contract, the Commission, citing section 8a(9), ordered the Board of Trade to halt trading in the contract for one day. The order recited that the Commission

had "reason to believe" that that an "emergency" existed with respect to the March wheat contract. Despite the Board of Trade's conviction that normal market conditions prevailed, and that no "emergency" existed within the meaning of section 8a(9), the Board of Trade abided by the order because insufficient time existed to mount an effective challenge and because the order was limited to one day's trading. Accordingly, trading was halted on Friday, March 16, 1979. (The Commission's order is reproduced as Appendix D). The Commodity Exchange Act does not provide for a hearing either prior to or after the issuance of such orders, and the Commission acted without conducting a hearing.

On the evening of March 16, 1979 the Commission issued a new order invoking section 8a(9) for the second time in as many days, and directed that trading in the contract immediately cease and that all outstanding contracts be terminated involuntarily at a price fixed by the Commission. Owners of contracts representing approximately 8.8 million bushels of wheat, with a market value in excess of $32,000,000, were immediately and directly affected by the order. Once again the order, issued without any hearing, recited that the Commission had "reason to believe" that an "emergency" existed. (The second order is reproduced as Appendix E).

E. The District Court Proceeding

The Board of Trade promptly filed suit to enjoin the Commission's action. Citing the specificity with which Congress has defined "emergency" in section 8a(9), the Board alleged in its Complaint that those statutory elements of an "emergency" were not present and the Commission's order was, therefore, arbitrary and capricious, issued without statutory authority, and beyond the jurisdiction of the Commission.

On Sunday, March 18, a hearing was held before the emergency judge for the Northern District of Illinois. At the outset of the proceeding, the Commission presented to the District

Court a memorandum contending that orders issued under section 8a(9) are not subject to judicial review. The Board of Trade, at the same time, filed an opposing brief. The District Court took the issue under advisement and proceeded with the hearing.

The Board of Trade introduced extensive testimony and documentary evidence, unrebutted by the Commission (which presented no factual defense), that an "emergency" within the specific statutory definition did not then exist. The Commission confined its presentation to the argument that a determination whether an emergency exists is exclusively committed to its discretion and, as such, may not be inquired into by a federal court.

The Court concluded that:

> I do have both the right and the obligation to determine whether there is reason to believe or whether the Commission has a reason to believe that an emergency exists. (Tr. 158).

The Court found that the evidence of the Board of Trade was "clear and unequivocal" that no "emergency" existed as the term is defined by Congress and granted a preliminary injunction.

F. The Expedited Appellate Proceeding

The following morning, Monday, March 19, the Commission filed a notice of appeal and requested the Seventh Circuit to stay the District Court's order pending appeal. The full briefs of the parties, as well as the complete trial transcript, were transmitted to the Circuit Court for its review. After receiving that record, a three judge panel of the Court denied the Commission's requested stay in an order (Appendix B) and confirmed the District Court's opinion that section 8a(9) orders are judicially reviewable:

> We must also agree with the district court that the wording of the applicable statute and the nature of the agency determination permits the federal court to exercise jurisdiction to review the alleged arbitrariness of an agency decision. *United States* v. *Bush,* 310 U. S. 371 (1939).

Subsequently, the issues were briefed in full and the case was argued before a different panel of the Seventh Circuit. This panel concluded that the controversy was not moot, vacated the District Court's order and, contrary to the previous panel's determination, held on the same record that whether an "emergency" exists within the meaning of section 8a(9) is committed exclusively to the Commission's discretion and, therefore, Commission orders invoking section 8a(9) cannot be reviewed (even for alleged arbitrariness).

While the panel expressly recognized that Congress intended to circumscribe the Commission's section 8a(9) powers by incorporating a specific, limited definition of "emergency," and that agency action may always be reviewed to determine whether it is repugnant to statutory autnority, it nonetheless determined that section 8a(9) orders are immune from judicial review *even if they are issued in contravention of the Congressional definition of "emergency."*

REASONS FOR GRANTING THE PETITION

1. The Seventh Circuit's opinion is in clear conflict with several decisions of this Court, particularly *Citizens to Preserve Overton Park* v. *Volpe,* 401 U. S. 402 (1971), which hold that judicial review of agency action is always available except for two narrow exclusions (express preclusion of review or committal to exclusive agency discretion), neither of which is present here.

2. By endorsing regulatory action without a hearing at any stage of the proceeding and precluding judicial review of that action, the decision raises a significant constitutional issue of whether there has been a deprivation of property rights without due process in violation of the Fifth Amendment.

3. The Supreme Court has not, heretofore, determined whether "emergency" orders issued by the Commission are immune from judicial review. This is an important issue of federal law which should be settled by the Court. It affects all American contract markets, millions of commodity futures contracts having an aggregate value of many billions of dollars, and the operations of thousands of companies that utilize the futures markets for commercial pricing and price protection. Directly affected are three major exchanges located in Chicago on which 75 per cent of all futures trading in the United States is conducted.

Since foreclosure of review allows the Commission to exceed its statutory authority at will, the Seventh Circuit's opinion promises to be destructive of the futures markets and the important economic role they perform. The credibility of the markets as commercial "hedging" and pricing vehicles depends upon their protection from unlawful, arbitrary or unreasonable interference by the Commission that destroys confidence in the reliability of their services and the integrity of their contracts.

ARGUMENT

I. The Decision Below Conflicts with Decisions of This Court Which Narrowly Construe Preclusion of Judicial Review.

The Administrative Procedure Act, 5 U. S. C. § 701, denies judicial review of final agency action only in two instances: where preclusion is express, or where action is exclusively committed to agency discretion. In contradistinction to other sections of the Commodity Exchange Act [§ 2(a)(8)(B) and § 5a(12)], section 8a(9) does not expressly preclude judicial review. Acknowledging that there is no express preclusion, the Seventh Circuit based its decision on a determination that actions taken by the Commission pursuant to section 8a(9) are exempt from judicial review because they are committed solely to agency discretion. This determination is not in accordance with applicable decisions of this Court, or the language and legislative history of section 8a(9).

In the leading case construing the exception to judicial review, *Citizens to Preserve Overton Park* v. *Volpe*, 401 U. S. 402, 410 (1971), the Court said:

> This is a very narrow exception. . . . The legislative history of the Administrative Procedure Act indicates that it is applicable in those rare instances where "statutes are drawn in such broad terms that in a given case there is no law to apply."

Thus it is always presumed that judicial review is available, and the Commission had the heavy burden of overcoming that presumption by "clear and convincing evidence." *Abbott Laboratories* v. *Gardner*, 387 U. S. 136, 141 (1967).

Even the most cursory examination of section 8a(9) plainly reveals that it is not drawn in such broad terms that there is no law to apply. Congress specified that an emergency could only be declared in the event of threatened or actual manipulations and corners or where a governmental act or other major market disturbance prevents the market from accurately reflecting the forces of supply and demand. Thus, Congress defined "emergency" with precision and stated plainly that the Commission was "to use its extraordinary emergency powers only in the case of a defined emergency." [Sen. Rep. No. 93-1131, 93d Cong., 2d Sess. 25 (1974)].

The Seventh Circuit expressly recognized that it was Congress' intent to define "emergency" narrowly and to delimit the Commission's powers:

> Congress chose to define emergency narrowly in Section 8a(9) so that the Commission could not exert its extraordinary powers except in a case of a defined emergency. [605 F. 2d at 1022.]

Yet, inexplicably, the Seventh Circuit concluded that the statute was too broadly drawn to permit judicial review and that Congress had, in fact, intended to preclude review.[2]

Since Congress intended, as the Seventh Circuit agrees, to prevent the Commission from exerting "its extraordinary powers except in the case of a defined emergency", judicial review is the only means available to assure compliance with the legislative intent and the clear language of section 8a(9). If the Seventh Circuit is correct, the clear and careful definition of "emergency" written by Congress is mere excess baggage. It can only be concluded that the Seventh Circuit, having properly concluded that section 8a(9) is narrowly drawn, failed to apply *Volpe* and related decisions of this Court.

As the Seventh Circuit recognized, even those matters which are committed to agency discretion are subject to a degree of judicial review. (605 F. 2d at 1021, fn. 6). However, after acknowledging that review of agency action is available in such cases, the Seventh Circuit emasculated even that limited form of review by holding that any inquiry into the actual existence of an "emergency" was foreclosed. Such an inquiry, however, goes to the fundamental jurisdictional question of whether the Commission has acted within or in excess of its statutory authority. The exercise of emergency authority in the absence of an "emergency" as expressly defined by Congress and limited to verifiable circumstances is the clearest possible example of an action "repugnant to statutory authority." The action taken by the Commission in this case was properly enjoined by the District Court even if that narrow criterion for review were applicable in this case.

2. In determining Congress' intent, the Seventh Circuit failed to demand "clear and convincing evidence" of legislative intent to bar judicial oversight (see *Abbott Laboratories, supra*) but relied, instead, on a pastiche of legislative history consisting of vague, generalized recitations of public policy applicable to any regulatory scheme. In fact, the Court even acknowledged that Congress did not expressly address itself to the subject of preclusion of judicial review. 605 F. 2d at 1022.

The Seventh Circuit's opinion plainly ignores the principle that actions committed to agency discretion may be set aside for failure to conform to statutory authority or if the action taken is clearly wrong. *United States* v. *Shimer*, 367 U. S. 374 (1961). The facts in this case leave little doubt that the Commission's March 16, 1979 order was both clearly wrong and beyond its statutory authority. The Commission has authority to invoke section 8a(9) when it has reason to believe an "emergency" exists. When no "emergency" exists, the Commission is without "reason" to assert that authority or to take such action. And the undisputed record in this case clearly demonstrates that the "emergency" order was not reasonably issued.

The opinion of the Seventh Circuit misapplied the decisions of this Court in concluding that emergency action was insulated from review. Even if such action were discretionary, it is still reviewable to determine if the Commission has acted in accordance with its statutory mandate. *Volpe, supra; Shimer, supra; Arenas* v. *United States*, 322 U. S. 419 (1944). Review by the Supreme Court is imperative to correct the Seventh Circuit's radical departure from the law as established by this Court.

II. The Decision of the Seventh Circuit Violates the Due Process Clause.

The Board of Trade brought this action to protect rights in property granted to it and its members under the Commodity Exchange Act.[3] No decision of this Court has ever held that a government agency may permanently deprive persons of property without an opportunity for a hearing. Yet the Seventh Circuit's interpretation of section 8a(9) permits the Commission to abrogate contractual and property rights without a hearing of any kind, either before or after the deprivation becomes final.

We recognize that, under appropriate circumstances, property rights may be impaired by government action without a *prior*

3. *See Hunt* v. *Washington State Apple Advertising Commission*, 432 U. S. 333 (1977).

hearing. *Ewing* v. *Mytinger & Casselberry, Inc.*, 339 U. S. 594 (1950). But the availability of relief after temporary administrative impairment of property rights is imperative under the due process clause of the Fifth Amendment.

When the Commission invokes its emergency authority there is no hearing prior to the action. Such summary action, standing alone, need not amount to a constitutional violation. However, the Circuit Court's denial of a right to judicial review after the action is taken and the deprivation of property has become irreversible is constitutionally deficient and in direct conflict with decisions of this Court.

In *Ewing*, the Court said: "It is sufficient where only property rights are concerned, that there is at *some stage* an opportunity for a hearing and a judicial determination." 339 U. S. at 599 (Emphasis added). In his separate opinion in *Arnett* v. *Kennedy*, 416 U. S. 134, 178-179 (1974), Mr. Justice White explained this doctrine:

> The past cases of this Court uniformly indicate that some kind of hearing is required at sometime before a person is finally deprived of his property interests.
>
> * * * * *
>
> Where the Court has rejected the need for a hearing prior to the initial "taking", a principal rationale has been that a hearing would be provided before the taking became final. [Citations omitted].
>
> * * * * *
>
> While these cases indicate that the particular interests involved might not have demanded a hearing immediately, they also reaffirm the principle that property may not be taken without a hearing at some time.

Denial of judicial review of Commission "emergency" action contravenes this principle and gives unconstitutional interpretation to section 8a(9). "In the case of all acts of Congress, such interpretation ought to be adopted as, without doing violence to the import of the words used, will bring them

into harmony with the Constitution." *The Japanese Immigrant Case*, 189 U. S. 86, 101 (1903). Summary action which deprives persons of property rights is only appropriate where a subsequent judicial determination is available. *Ewing, supra; Phillips* v. *Commissioner*, 283 U. S. 589 (1931); *Bowles* v. *Willingham*, 321 U. S. 503 (1944). An agency may not permanently deprive persons of property rights through summary action. *See Securities and Exchange Commission* v. *Sloan*, 436 U. S. 103 (1978). *Ewing, supra.*

Granting the requested writ is justified to examine the principle articulated by the Seventh Circuit: That the Board of Trade, its members, and the public users of the futures markets can be permanently and irreversibly deprived of property rights recognized by the Commodity Exchange Act and guaranteed by the Constitution without an opportunity for any type of hearing at any time.

The deference accorded to the determination of an administrative agency must be consistent with constitutional rights and the duty of the agency to adhere to the limitations imposed by Congress upon its power. As the Court has observed:

> Expert discretion is the lifeblood of the administrative process, but "unless we make the requirements for administrative action strict and demanding, *expertise*, the strength of modern government, can become a monster which rules with no practical limits on its discretion". [*Burlington Truck Lines, Inc.* v. *United States*, 371 U. S. 156, 167 (1962) (emphasis in original) (citation omitted)].

This case exemplifies the threat perceived by the Court. At issue is whether the judicial branch will abdicate its constitutional role in the face of an arrogant usurpation of regulatory authority.[4]

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4. Judicial review does not impair the Commision's proper function because any "emergency" order will remain in full force until a court rules otherwise.

III. The Issue Presented Is One Which Has Not, and Should Be, Decided by This Court.

"The importance of futures trading to the general public and to the Nation equals the importance of the securities markets." [Sen. Rep. No. 93-1131, 93d Cong., 2d Sess. 19 (1974)]. In order "(1) to provide a uniform regulatory structure covering all futures trading in both the regulated and previously unregulated commodities and (2) to allow for the extension of the economic benefits of futures trading under this structure to those areas of commerce where the risk-shifting and price-discovery functions of futures markets might prove to be of value," Congress enacted major amendments to the Commodity Exchange Act in 1974. [Sen. Rep. No. 95-850, 95th Cong., 2d Sess. 10 (1978)]. Among the changes made, Congress created the Commodity Futures Trading Commission, transferred to that new agency the regulatory functions previously assigned to the Department of Agriculture, and placed all futures trading under the Commission's exclusive jurisdiction. In addition, Congress granted the Commission new powers, one of which is the emergency authority at issue here.

In amending the Act, however, Congress proceeded "gingerly and with caution" to avoid any "precipitous action which would be detrimental to the trading of commodity futures" or "that would tend to damage viable futures contracts." [Sen. Rep. No. 93-1131, 93d Cong. 2d Sess. 20 (1974)]. That caution proved well founded. In 1978, when considering reauthorization of the Commission, Senator Eagleton, for example, described the Commission as "nearly 100 percent messed up". [124 Cong. Rec. S 10540 (daily ed. July 12, 1978)]. Caution and restraint have been the hallmarks of Congress' attitude toward regulation of commodity futures since the establishment of the Commission.

Futures contracts are now traded on 10 exchanges designated as "contract markets" by the Commission. Located in Chicago, New York City, Kansas City, and Minneapolis, these exchanges

provide markets for futures trading in agricultural and forest products, metals, rubber and petroleum products, foreign currencies and financial instruments. In 1979, nearly seventy-five million contracts were traded on these exchanges, representing billions of dollars worth of commodities.

Such a level of public participation can only be sustained, and the essential economic functions of the exchanges be fulfilled, where investors can be confident that their contractual rights are safe from arbitrary or unauthorized impairment by the Commission. The decision of the Seventh Circuit puts all market users on notice that their contractual rights are vulnerable to even illegal regulatory action.

The devastating impact of the improper application of "emergency" action by government agencies is well known to the Court. As recently as 1978 the Court had occasion to remark upon that impact. *Securities and Exchange Commission* v. *Sloan*, 436 U. S. 103 (1978). In *Sloan* the Court said:

> [T]he power to summarily suspend trading in a security even for 10 days, without any notice, opportunity to be heard, or findings based upon a record, is an awesome power with a potentially devastating impact on the issuer, its shareholders, and other investors. 436 U. S. at 112.

The suspension of trading ordered by the Commission in this case was even more devastating. Futures contracts, unlike securities, are limited-life instruments; each contract has a predetermined expiration date. The March 1979 wheat contract expired March 21, 1979. When trading in a security is suspended, the lifting of the suspension restores to the shareholder, more or less unimpaired, all the rights of ownership. By contrast, the Commission's "emergency" order in this case would have permanently and irreversibly deprived investors of their property rights in the March contract. Absent judicial review promptly upon issuance of the order, those futures contracts would have been irretrievably lost.

As was stated in *Sloan:* "[E]ven a 1-year suspension as here, without notice or hearing so obviously violates fundamentals of due process and fair play that no reasonable individual could suppose that Congress intended to authorize such a thing." 436 U. S. at 123-124 (Brennan, J., concurring). It is equally unreasonable to suppose that Congress, in "cautiously" amending the Commodity Exchange Act, intended to permit the Commission to permanently deprive investors of their property with neither an opportunity for a hearing before the suspension, nor any judicial review afterwards.

The economic importance of futures trading and futures markets to the American economy, and the importance of the legal issue presented, make consideration by this Court appropriate. The relationship between this new administrative agency and the industry that it regulates is not yet sufficiently defined. We submit that Congress did not intend to give this agency the unbridled power to regulate in a manner so destructive of an economically important industry and insulate that potentially devastating power from reasonable judicial restraint.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the requested writ should be granted.

Respectfully submitted,

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APPENDIX A.

IN THE UNITED STATES COURT OF APPEALS
For the Seventh Circuit

No. 79-1278

THE BOARD OF TRADE OF THE CITY OF CHICAGO,
Plaintiff-Appellee,

v.

COMMODITY FUTURES TRADING COMMISSION,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 79-C-1068—John F. Grady, *Judge.*

ARGUED JUNE 7, 1979—DECIDED SEPTEMBER 12, 1979

Before FAIRCHILD, *Circuit Judge,* CUMMINGS, *Circuit Judge,* and CAMPBELL, *Senior District Judge.**

CAMPBELL, *Senior District Judge.* Finding that an emergency order of the Commodity Futures Trading Commission (Commission) was judicially reviewable, the district court conducted an evidentiary hearing concerning the question of whether there was reason to believe that an emergency existed. Concluding that no emergency existed, the district court enjoined the enforcement of the Commission's order. We vacate the district

* Senior District Judge William J. Campbell of the United States District Court for the Northern District of Illinois, is sitting by designation.

court's order because we find that the Commission's emergency determination is not judicially reviewable.

I.

Responding to increased concern over the lack of effective regulation of futures trading, Congress extensively amended the Commodity Exchange Act, 7 U. S. C. § 1 *et seq.* (Act),[1] by enacting the Commodity Futures Trading Commission Act of 1974, Pub. L. 93-463, 88 Stat. 1389 (CFTC Act). The CFTC Act established the Commission, which was granted exclusive jurisdiction to regulate futures trading in numerous commodities. The Commission was provided with broad regulatory and enforcement authority to protect market participants and to insure fair dealing in commodity futures trading.

The Act, as amended, empowers the Commission to direct commodities exchanges to take action in emergency situations. Section 8a(9) of the Act, 7 U. S. C. § 12a(9) provides in relevant part that the Commission is authorized:

> "To direct the contract market whenever it has reason to believe that an emergency exists, to take such action as, in the Commission's judgment, is necessary to maintain or restore orderly trading in, or liquidation of, any futures contract. The term 'emergency' as used herein shall mean, in addition to threatened or actual market manipulations and corners, any act of the United States or a foreign government affecting a commodity or any other major market disturbance which prevents the market from accurately reflecting the forces of supply and demand for such commodity. . . .".

On Thursday, March 15, 1979, the Commission, pursuant to this section, issued an order to the Board of Trade of the City

1. The Grain Futures Act, which was enacted in 1922, was generally amended by Congress in 1936; its title was changed to the Commodity Exchange Act. 49 Stat. 1491. Prior to the enactment of the CFTC Act of 1974, federal regulation of futures trading markets was relatively limited with regulation of the commodities markets to prevent abuses having been left principally to the commodities exchanges.

of Chicago (Board of Trade) to suspend all trading in the March 1979 Wheat Futures Contract (Contract) for the following day, Friday, March 16, 1979. The order stated that the Commission had reason to believe that an emergency within the meaning of Section 8a(9) of the Act existed with respect to the Contract in that significant transportation and warehouse facility shortages had caused a major market disturbance which prevented the market from accurately reflecting the forces of supply and demand. The order additionally specified that the Commission had reason to believe that there existed a threatened manipulation or corner in wheat as a consequence of this market disturbance and as a result of the combined long open positions maintained in the Contract by a small number of speculative traders.

The order recited that market surveillance data and information reported to the Commission, and information acquired by it from cash grain merchants, grain elevator operators, and futures commission merchants, indicated that:

> "(1) a small number of speculative traders has established and as of this date, is continuing to maintain large, potentially dominant, long open positions in the Contract;
>
> (2) although only four trading days remained before expiration of trading in the Contract on March 21, 1979, this small number of speculative traders is continuing to maintain large long open positions in the Contract while at the same time other traders in the Contract are reducing their long open positions; as a result, the combined long positions of this small number of traders are comprising an increasingly large portion of the total open interest in the Contract as the last day of trading approaches, with that combined interest representing as of this date more than eighty percent of the total open interest in the Contract;
>
> (3) the combined long open positions presently maintained in the contract by the small number of traders substantially exceed the total quantity of wheat currently available in positions from which delivery can be made in fulfillment of the Contract;

(4) even as to wheat currently in deliverable position pursuant to the Contract, not all is acceptable or available for delivery on the Contract in that a portion of this wheat is of undeliverable variety or grade, or is owned by or committed to commercial users;

(5) there is a significant shortage of transportation facilities by which additional wheat may be moved into deliverable position during March 1979, the period allowed for deliveries to be made pursuant to the Contract;

(6) there is a significant shortage of warehouse facilities to accommodate any such additional wheat;

(7) there is a perceived distortion of the price relationships between the Contract and other values of wheat." [App. 1a-2a]

The Board of Trade complied with the Commission's order, and all trade in the Contract was suspended on Friday, March 16. Throughout that day Board of Trade officials and the Commission communicated with each other concerning further trading in the Contract. On that Friday afternoon the President of the Board of Trade advised the Commission that under its own rules it had declared an emergency in the Contract and that trading would be limited to "liquidation only (except new sales for delivery only)."[2] In response to the Commission's inquiry concerning what reasons the Board of Trade intended to announce for issuing the order, the President of the Board of Trade stated that the true reason was the shortened trading period remaining due to the one day suspension of trading ordered by the Commission.[3] After the Commission notified the Board of Trade President that such a reason was unacceptable, the Board of Trade issued its order which stated that "various factors" led

2. The Board of Trade's emergency order had the effect of prohibiting a trader from assuming a new position in the Contract. The order did not require traders already in the market to reduce or settle any existing positions which they may have held.

3. When the Commission issued its emergency order on March 15, suspending trade in the Contract for the following day, there were four trading days remaining in the Contract. The Commission's order reduced the number of trading days to three.

to the conclusion that trading in the Contract should be limited to liquidation only.

That same evening the Commission issued a supplemental order. The supplemental order recited that the Commission continued to believe that an emergency existed with respect to the Contract, and that further action was appropriate. The Commission ordered the Board of Trade to:

"(1) immediately terminate all trading in the Contract on March 19, 20, and 21, 1979, the three remaining trading days in the Contract;

(2) permit deliveries of wheat to be made in fulfillment of current open positions in the Contract through the last day permitted for delivery under the rules of the Chicago Board of Trade at the settlement price for the Contract in effect at the close of trading in the Contract on March 15, 1979; and

(3) settle all positions in the Contract remaining open as of the close of business on March 30, 1979, at the settlement price for the Contract in effect at the close of trading in the Contract on March 15, 1979." [App. 5a]

On the next day, Saturday, March 17, the Board of Trade instituted this action in the district court seeking review of the Commission's March 16 supplemental order. The complaint asserted that the Commission's order was arbitrary, capricious, an abuse of discretion, not in accordance with law, and in excess of the Commission's statutory authority because no emergency existed within the meaning of Section 8a(9) of the Act. The Board of Trade's complaint sought an injunction restraining the Commission from enforcing its March 16 supplemental order.

On Sunday, March 18, the district court conducted an evidentiary hearing on the Board of Trade's motion for a preliminary injunction. The Board of Trade produced five witnesses whose testimony tended to show that no emergency within the meaning of Section 8a(9) existed with respect to the Contract. The Commission offered no evidence at the hearing, but rather

stood on the position that its emergency order was not judicially reviewable. At the conclusion of the hearing Judge Grady granted the motion for a preliminary injunction, finding that there was no evidence of any "emergency" as that term is defined in Section 8a(9).

II.

The Commission immediately filed a notice of appeal of the district court's decision, and on March 19, 1979, filed in this court an "Emergency Motion for a Stay Pending Appeal." On the same day a panel of this court denied the motion, noting that the applicable statute and nature of the agency determination permitted judicial review of the alleged arbitrariness of the agency decision, and that the complete absence of any support for the Commission's emergency determination left the claim of arbitrary action undisputed. Thereafter the Board of Trade moved to dismiss this appeal, contending that our March 19 order denying the emergency motion for a stay constituted a final determination of the legal and factual issues and is the binding law of the case.[4] We do not agree.

Our March 19 order did not purport to rule on the merits of this appeal. The panel only addressed the question of whether it ought to grant a stay of the district court's injunctive order. In this regard the panel addressed itself to the traditional considerations involved in such a motion: likelihood of success on the merits of the appeal, irreparable harm, and vindication of the public interest. Since the March 19 order only reflected a discretionary ruling by this court and because the panel's statement that the Commission's order was judicially reviewable and that the Commission failed to rebut the charge of arbitrariness were made in connection with a discretionary ruling, and not with respect to a plenary review of the merits of the appeal, we deny the motion to dismiss the appeal.

4. In an order dated May 3, 1979, this court stated that it would consider the motion to dismiss with the appeal.

III.

The Board of Trade also contends that the appeal should be dismissed because the district court's injunctive order expired simultaneously with the expiration of the Contract on March 21, 1979, and therefore the events, conditions and circumstances giving rise to this case are no longer in existence. Consequently, the Board of Trade argues, the appeal should be dismissed on the ground of mootness. While it is true that the district court's order expired on March 21, 1979, and that the events underlying this controversy are now history, this case falls squarely into the well established exception to otherwise moot litigation.

In *Southern Pacific Terminal Co.* v. *I. C. C.,* 219 U. S. 498, 515 (1911), the Supreme Court recognized that the rule requiring dismissal of an appeal on the ground of mootness does not apply in those situations where, due to the short duration of a challenged agency order, a controversy is "capable of repetition, yet evading review." In non-class action cases two elements must combine for the case to fall within this exception:

> "(1) the challenged action [is] in its duration too short to be fully litigated prior to its cessation or expiration, and
>
> (2) there [is] a reasonable expectation that the same complaining party [will] be subjected to the same action again."

Weinstein v. *Bradford,* 423 U. S. 147, 149 (1975), citing *Sosna* v. *Iowa,* 419 U. S. 393 (1975).

We need go no farther than the facts in this case to find that the challenged order is of sufficiently short duration that full litigation prior to its expiration would be impossible. We are, after all, dealing with perceived emergency situations and the Commission's attempts to take action to maintain or to restore order in the trading of a futures contract. Emergencies are not predictable and, as the circumstances of this case demonstrate,

any action taken by the Commission to remedy an emergency is very likely to be short-lived in nature and effect.

It is also reasonable to expect that the Board of Trade and the Commission will find themselves again embroiled in a controversy similar to the one presented by the facts of this case. The Commission is charged with regulating the ten commodity markets in this country. The Board of Trade is the largest such market in the world, and the record shows that it does more business than all of the other exchanges combined. In view of the prominence of the Board of Trade among the commodities exchanges, it is reasonable to anticipate that if a Section 8a(9) emergency arises again the Board of Trade very likely may be subject to a Commission order. The applicability of the "capable of repetition, yet evading review" exception does not depend upon a conclusion that the challenged action must necessarily recur; rather, there need only be a reasonable expectation that it will do so. See: *SEC* v. *Sloan,* 436 U. S. 103, 109-110 (1978). We conclude that it is reasonable to expect that the Board of Trade will be subject again to a Commission's Section 8a(9) emergency order.[5] Consequently we conclude that this case is not moot, and proceed to the merits of the appeal.

IV.

Agency action is exempt from judicial review where a statute precludes such review, or the action is committed to agency discretion by law. 5 U. S. C. § 701(a)(1) and (2). In this case the Commission contends that its determination that an emergency exists within the meaning of Section 8a(9) of the Act and its actions taken with respect thereto are not subject to judicial review. Since no provision of the Act expressly precludes judicial review of the Commission's Section 8a(9) determination and action, the Commission asserts that such a determination and action are not subject to judicial review because they are committed to the Commission's discretion.[6]

5. We find no merit to the Board of Trade's contention that the "capable of repetition, yet evading review" doctrine can be asserted only by private parties. The argument that the doctrine is unavailable to a government agency is refuted by the very decision which formulated the doctrine. In that decision the Supreme Court stated that the fact "that the Government is the respondent, not complainant, does not lessen or change the character of the interests involved in the controversy or terminate its questions." *Southern Pacific Terminal Co.* v. *I. C. C., supra,* 219 U. S. at 516.

The availability of judicial review is not a novel issue. Recently the Supreme Court summarized the state of the law as follows:

> "It is now well settled that 'judicial review of final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress.' *Abbott Laboratories* v. *Gardner,* 387 U. S. 136, 140 (1967). The reviewing court must determine whether 'Congress has in express or implied terms precluded judicial review or committed the challenged action entirely to administrative discretion.' *Barlow* v. *Collins,* 397 U. S. 159, 165 (1970)." (Footnote omitted). *Morris* v. *Gressette,* 432 U. S. 491, 501 (1977).

Accordingly we must determine whether Congress impliedly intended to preclude judicial review of the Commission's actions under Section 8a(9), or committed those actions entirely to the Commission's discretion. In this regard we note that "the ultimate

6. The Commission concedes that agency action committed to agency discretion is nevertheless judicially reviewable where such action is challenged on constitutional grounds, or upon a claim that the agency has acted in bad faith or in a manner plainly repugnant to its statutory authority. See, *e.g. Leedom* v. *Kyne,* 358 U. S. 184, 188 (1958); *Coppenbarger* v. *Federal Aviation Administration,* 558 F. 2d 836, 838 (7th Cir. 1977); *Ness Inv. Corp.* v. *U. S. Dept. of Agr., Forest S.,* 512 F. 2d 706, 716-17 (9th Cir. 1975). The complaint asserted that the Commission's Section 8a(9) determination and action were beyond, and therefore repugnant to, the agency's statutory authority because no emergency existed within the definition of emergency contained in Section 8a(9). We view the complaint as a challenge to the merits of the Commission's emergency determination in the context of Section 8a(9). Congress authorized the Commission to make the kind of determination it made in this case so that it cannot be seriously argued that the Commission's emergency order pursuant to Section 8a(9) constitutes agency action repugnant to statutory authority.

analysis is always one of Congress' intent," *Southern R. Co.* v. *Seaboard Allied Milling Corp.*, ... U. S. ..... (Slip Op., June 11, 1979, at 9), and that "only upon a showing of 'clear and convincing evidence' of a contrary legislative intent should the court restrict access to judicial review." *Abbott Laboratories* v. *Gardner, supra,* 387 U. S. at 141.

A review of the CFTC Act and its legislative history reveals that the preclusion of judicial review of the Commission's Section 8a(9) actions was not a subject to which Congress explicitly addressed itself. Thus, in determining whether it was the purpose of Congress to preclude judicial review of Section 8a(9) actions by committing such actions entirely to agency discretion (5 U. S. C. § 701(a)(2)), we turn to an examination of the language which Congress employed, the structure of the Act, its legislative history, and the nature of the agency's Section 8a(9) action in the regulatory scheme. See, *e.g., Southern R. Co.* v. *Seaboard Allied Milling Corp., supra; Morris* v. *Gressette, supra.*

A.

The language which Congress employed in Section 8a(9) supports the proposition that the Commission's determination of the existence of an emergency is committed to agency discretion. Congress empowered the Commission "whenever it has reason to believe[7] that an emergency exists" to direct contract markets

7. The Board of Trade argues that the use of "reason to believe" in Section 8a(9) and in other regulatory statutes signifies a Congressional intent that a decision based on "reason to believe" is judicially reviewable. We reject this talismanic approach in favor of viewing the phrase in the context of the regulatory scheme and the purposes for which Congress enacted the CFTC Act. Congress obviously employed the phrase "whenever it has reason to believe" to indicate that the reason to believe must be held by the Commission. In the instant case the district court substituted its judgment for the Commission's on the threshold question of whether or not an emergency as defined by Section 8a(9) existed. The language of the section clearly does not reflect a Congressional intent that such a substitution of judgment occur. See *United States* v. *Southern Railway Company,* 364 F. 2d 86, 94-95 (5th Cir. 1966), *cert. denied,* 386 U. S. 1031 (1967).

to take any action which, "in the Commission's judgment," is required to maintain order in the trading of a futures contract. The prerequisite for Commission action is its "reason to believe that an emergency exists." That "reason to believe" cannot be based on any perceived emergency, but only upon the type of emergency which Section 8a(9) defines: "actual or threatened market manipulations and corners, acts of government affecting a commodity, and any other major market disturbance which prevents the market from accurately reflecting the sources of supply and demand for such commodity."

The legislative history reveals Congressional concern over the Commission's emergency powers and the affect on the commodities markets occasioned by the invocation of those powers. Congress chose to define emergency narrowly in Section 8a(9) so that the Commission could not exert its extraordinary emergency powers except in a case of a defined emergency. See S. Rep. No. 93-1131, 93d Cong., 2d Sess., reprinted in 1974 U. S. Code Cong. and Adm. News 5843, 5865; see also Conf. R. No. 93-1383, reprinted in *Id.* at 5899-5900. That Congress chose to limit the circumstances in which the agency could invoke its emergency powers does not mean that Congress intended to remove the determination of the existence of an emergency from agency discretion.[8] Rather, it is apparent to us

8. The Board of Trade argues that since Section 8a(9) narrowly limits the situations in which the Commission may invoke its emergency powers, there is "law to apply" to determine whether the Commission's decision is correct, and therefore the Commission's decision is not committed to the agency's discretion. See *Citizens To Preserve Overton Park* v. *Volpe,* 401 U. S. 402, 410 (1970). This argument overlooks the fact that Section 8a(9) empowers the Commission to take emergency action in face of actual or threatened manipulations and corners—events which Congress chose not to define. The detection of manipulations and corners, as well as a "market disturbance which prevents the market from accurately reflecting the forces of supply and demand," is addressed to the expertise Commission with reference to numerous market factors. As such, there is "no law to apply" to determine the correctness of the Commission's decision that an emergency exists within the statutorily defined circumstances.

that Congress carefully designated the context in which a discretionary decision could be made.

B.

The structure of the Act also indicates that Congress intended a Section 8a(9) determination to be committed to the Commission's discretion. In Section 6(b) of the Act, 7 U. S. C. § 9, Congress provided that the Commission "may" institute administrative enforcement proceedings against persons it has "reason to believe" are in violation of the provisions of the Act. Judicial review of these proceedings is expressly provided for. Similarly, under Section 6(c) of the Act, 7 U. S. C. § 13a-1, the Commission "may" institute an action in the district court against individuals or contract markets to enjoin violations of the Act. Within this regulatory scheme Congress provided the Commission with the additional enforcement weapon of emergency powers to be exercised in defined circumstances. We infer from the bestowal of those extraordinary powers a recognition by Congress that, due to the volatile and fluctuating nature of the futures markets, the traditional arsenal of administrative and injunctive enforcement remedies was not sufficient "to give [the Commission] a strong law which will enable it to regulate both agricultural and non-agricultural goods and services in the public interest." S. Rep. No. 93-1131 *supra,* at 5860.

Moreover, Congress provided the Commission with the traditional enforcement remedies of administrative proceedings and injunctive relief in order to prevent violations of the Act. A market emergency, however, is not necessarily the product of an activity in violation of the Act. Congress recognized this possibility when it authorized the Commission to invoke its emergency powers if it has reason to believe that an act of the United States or a foreign government affects a commodity.[9]

9. In this regard the Senate Committee on Agriculture, Nutrition, and Forestry recently stated: "[W]hile there is some possibility that a threat to the market may develop with no overt violation of the Act

(Footnote continued on next page.)

C.

With respect to the nature of the Commission's Section 8a(9) determination, we keep in mind that the Commission's actions under that section are taken in the context of carefully defined emergencies—unforeseen situations which are not amenable to the traditional administrative and injunctive enforcement remedies. The fact that the Commission is authorized by Congress to take emergency action is, in itself, a suggestion of Congressional intent to commit such actions to the Commission's discretion. *Morris* v. *Gressette, supra,* 432 U. S. at 501; *Ewing* v. *Mytinger & Casselberry, Inc.,* 339 U. S. 594, 601-602 (1950); *United States* v. *Southern Railway Co.,* 364 F. 2d 86, 94 (1966), *cert. denied,* 386 U. S. 1031 (1967); *Daugherty Lumber Co.* v. *United States,* 141 F. Supp. 576, 581 (D. Ore. 1956).

D.

The legislative history of Section 8a(9) also indicates that the Commission's determination of the existence of an emergency is a decision committed by Congress to the Commission's discretion. In the Act itself Congress recognized that commodity futures trading is "affected with a national public interest." Congress announced that:

> ". . . [T]he transactions and prices of commodity . . . are susceptible to speculation, manipulation, and control, and sudden or unreasonable fluctuations in the prices thereof frequently occur as a result of such speculation, manipulation, or control which are detrimental to the producer or the consumer . . . and render regulation imperative for the protection of such commerce and the national public interest therein."

(Footnote continued from preceding page.)

having been committed, the Commission retains the power to take necessary action in the face of an emergency under section 8a(9) of the act." S. Rep. No. 95-850, 95th Cong., 2d Sess., reprinted in 1978 U. S. Code Cong. and Adm. News 2087, 2118.

7 U. S. C. § 5. Congress made this declaration in enacting the predecessor Grain Futures Act.[10]

Prior to the enactment of the CFTC Act in 1974, federal regulation of commodity future markets was limited in terms both of the commodities regulated and the enforcement powers available to the Commission's predecessor. Congress became aware that regulation under the Act was not in step with the times, since there were many large and important futures which were completely unregulated. The Senate Committee on Agriculture and Forestry stated:

> "It is apparent that a regulatory agency cannot be expected to oversee the rapidly expanding and complex futures market without additional tools with which to do the job and proper organization and funding. In addition to providing the tools that the regulatory body would need in preventing violations and disciplining violators directly, its role in supervising exchanges must be substantially expanded. Unquestionably, exchanges are going to have to perform their regulatory role better in order to provide a viable market in which the public can have confidence. The Federal regulatory agency must be given the authority to require that exchanges do so."

S. Rep. No. 93-1131, *supra,* at 5859. In view of the need for more effective and more expansive regulation, the Committee resolved that:

> "It is, therefore, time to establish a regulatory authority in the commodity field similar to the Securities and Exchange Commission and to give that authority a strong law which will enable it to regulate both agricultural and nonagricultural goods and services in the public interest."

Id., at 5860.

The legislative history reflects considerable attention by Congress to the type of regulatory agency it should establish,[11] and

10. See Note 1, *supra.*

11. The CFTC Act of 1974 established the Commission as an independent regulatory agency responsible for administering and

(Footnote continued on next page.)

to what regulatory and enforcement powers the agency should have. With respect to the Commission's emergency powers, the House Committee on Agriculture favorably reported out H. R. 13113 which provided the Commission with authority to direct contract markets to act "whenever [the Commission] has reason to believe" that a market condition exists "which threatened orderly trading in, or liquidation of, any futures contract." H. R. 13113, 93d Cong., 2d Sess., § 215 (1974). That Committee noted that the effective use of the emergency power "required the exercise of expert and strictly impartial judgment by the Commission." H. R. Rep. No. 93-975, 93d Cong., 2d Sess. at 30 (1974).

The Senate Committee on Agriculture and Forestry "felt that the term 'emergency' was defined too loosely in the House bill and was disturbed by the fact that the Commission would be authorized to use extraordinary powers in cases other than a 'market emergency'." The Senate Committee amended H. R. 13113 to narrow the definition of emergency, and to require the Commission to make a judgment that the emergency itself "must have a greater adverse impact on the market than the action that the Commission proposes to take." The Committee also expressed its intention that the Commission's emergency powers be used "to make the markets work more effectively and to make them a more reliable marketplace." S. Rep. No. 93-1131, *supra,* at 5865-66.

The Committee of Conference adopted a compromise of the House and Senate versions of the emergency provision which was enacted as Section 8a(9). The Conference Committee deleted the Senate amendment requiring the Commission to make a judgment on the adverse impact of its proposed emergency actions, noting that "[a]t the outset of an emergency, it may

(Footnote continued from preceding page.)

enforcing the provisions of the Act. Congress gave the Commission exclusive jurisdiction to regulate futures trading. 7 U. S. C. § 2. Congress directed the President to nominate to the Commission persons with expertise in the areas covered by the Act. See: 7 U. S. C. § 4a(a).

not be practicable for the Commission to reach such a judgment." In cautioning against indiscriminate use of the emergency powers, the Conference Committee stated: "The effective use of the emergency powers requires the careful exercise of expert and impartial judgment by the Commission." Conf. Rep. No. 93-1383, 93d Cong., 2d Sess., reprinted in 1974 U. S. Code Cong. and Adm. News 5894, 5900.

The legislative history amply demonstrates a congressional purpose to establish a Commission with broad regulatory and enforcement powers, and with the capability and expertise of taking swift and effective action when the Commission has reason to believe an emergency exists. Congress recognized that regulation of the volatile futures markets could be accomplished effectively only through the use of an expert Commission, that situations could occur suddenly for which the traditional enforcement powers would be an inadequate response, and that therefore the Commission should have emergency powers, the exercise of which is committed to the expertise and discretion of the Commission. Judicial review of the Commission's emergency determination would thwart the very purpose for which Congress authorized the emergency powers.

V.

On the basis of the language which Congress employed, the structure of the enforcement provisions of the Act, the legislative history of the Act as amended, and the nature of the Commission's determination, we conclude that Congress intended to commit a Section 8a(9) determination to the Commission's discretion. We, therefore, conclude that the merits of the Commission's emergency determination are precluded from judicial review by operation of 5 U. S. C. § 701(a)(2).

For the reasons stated herein we vacate the order enjoining enforcement of the Commission's emergency order, and remand this case to the district court with directions to dismiss the complaint.

VACATED AND REMANDED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

March 19, 1979.

Before

Hon. Walter J. Cummings, *Circuit Judge*
Hon. Wilbur F. Pell, Jr., *Circuit Judge*
Hon. William J. Bauer, *Circuit Judge*

The Board of Trade of the City of Chicago,
Plaintiff-Appellee,

No. 79-1278 *vs.*

The Commodity Futures Trading Commission,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 79-C-1068

John F. Grady, Judge.

This matter comes before the court on the filing of the "Emergency Motion of the Commodity Futures Trading Commission for a Stay Pending Appeal" on March 19, 1979 by counsel for the defendant-appellant and the opposing memorandum of plaintiff-appellee also filed herein on March 19, 1979. The Court has thoroughly reviewed the aforesaid documents. Accordingly,

It Is Ordered that the "Emergency Motion of the Commodity Futures Trading Commission for a Stay Pending Appeal" is DENIED. An essential question in deciding whether an injunction pending appeal will issue is whether the moving party has demonstrated a likelihood of success on the results of the appeal, irreparable harm, and a vindication of the public interest. We agree with the Commission that in the light of the highly specialized economic expertise required, their decision is entitled to great deference. However, we must also agree with the district court that the wording of the applicable statute and the nature of the agency determination permits the federal court to exercise jurisdiction to review the alleged arbitrariness of an agency decision. *United States* v. *Bush,* 310 U. S. 371 (1939).

The failure of the Commission to present countervailing evidence, the purport of which would in essence be to demonstrate that its action was not arbitrary, overcomes in this case the customary deference accorded to the administrative determination of emergency. We do not say that the Commission would have been required to produce substantial countervailing evidence; we do say that the complete absence of any support for its emergency determination leaves the plaintiff's claim of arbitrary action undisputed.

APPENDIX C.

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

Board of Trade of the City of Chicago,
Plaintiff,
vs.
Commodity Futures Trading Commission,
Defendant.

ORDER GRANTING PRELIMINARY INJUNCTION

GRADY, District Judge: The Court hereby finds that it has jurisdiction over the parties and of the subject matter, and the Court hereby sets forth as its reasons for the issuance of the preliminary injunction the transcript of its findings of fact and conclusions of law, which is attached hereto as part of this order.

After hearing the evidence, Plaintiff's motion for preliminary injunctive relief is hereby granted. The Commodity Futures Trading Commission, its officers, agents, servants, employees and attorneys, are preliminarily enjoined and restrained from enforcing directly or indirectly the order of the Commodity Futures Trading Commission, instructing the Chicago Board of Trade on March 16, 1979, to:

(1) immediately terminate all trading in the Contract on March 19, 20 and 21, 1979, the three remaining trading days in the Contract;

(2) permit deliveries of wheat to be made in fulfillment of current open positions in the Contract through the last

day permitted for delivery under the rules of the Chicago Board of Trade at the settlement price for the Contract in effect at the close of trading in the Contract on March 15, 1979; and

(3) settle all positions in the Contract remaining open as of the close of business on March 30, 1979, at the settlement price for the Contract in effect at the close of trading in the Contract on March 15, 1979.

This preliminary injunction is issued because no "emergency" existed when the order was issued or now exists within the terms of Section 8a(9) of the Commodity Exchange Act (7 U. S. C. Section 12a(9)). The statutory definition of an "emergency" includes manipulation, corner, acts of governments or other major market disturbance, none of which have been found to exist.

TRANSCRIPT

Thank you, Mr. Angle.

The threshold question before the Court is whether we have jurisdiction to countermand the order of the Commission by way of injunctive relief.

The defendant cites a number of cases for the proposition that where a governmental agency is invested with discretionary power in an area, the Court lacks the power to review the exercise of that discretion. In the cases cited by the defendant the statute usually provided that the particular agency or official involved was authorized to take certain actions, if, in his opinion or if in its opinion or if in its judgment certain conditions existed.

A typical case of that kind is the first one cited by the defendant, the case of United States against Bush & Company, B-u-s-h, 310 US 362, where the statute provided that the President of the United States should take certain action in regard to tariffs,

"If in his judgment such rates of duty and changes are shown by such investigation of the commission to be necessary to equalize such differences in costs of production".

And the Court said that such language precluded a court from reviewing the exercise of that power.

The language that we have in the statute before us seems to me to be different from the language involved in the cases cited by the defendants, and I confess I have not had a chance to read all of those cases; but I am taking as true what the defendant says about them. And it appears in all of those cases the operable language of the statute talked about the opinion of the administrator.

In the instant case, the statute is Title 7, Section 12(a)(9) of the United States Code, and that provides that the Commission has the power to do certain things, "whenever it has reason to believe that an emergency exists." It seems to me that there is a difference between saying if in the opinion of the Commission an emergency exists and saying, "if it has reason to believe that an emergency exists." The word "reason" implies to me an objective test rather than a purely subjective test. It seems to me that the language "reason to believe" is tantamount to "reasonable belief."

And "reasonable belief" in turn necessarily implies a factual basis and a rational conclusion reached from those facts.

Now, the statute goes on to say that if the Commission has reason to believe that an emergency exists it may take such action as in the Commission's judgment is necessary to maintain or restore orderly trading. The judgment that is referred to there is certainly analogous to the judgment or opinion that was involved in the cases relied upon by defendants; but the judgment in the instant case relates to the action that is to be taken rather than to the threshold question of whether an emergency exists. That at least is the way I read the statute. It seems to me it is an interpretation that gives effect to all the words that Congress saw fit to use, and it does not appear to me that it does violence to anything that either side has pointed out about the legislative history. Therefore, it seems to me that contrary to the position taken by the defendant, I do have both the right and the

obligation to determine whether there is reason to believe or whether the Commission has reason to believe that an emergency exists.

Now, the next question is what standard of review I apply to that question. Well, surely, it is not for me to make the determination independently. Rather, it is for me to determine whether there is any evidence in support of the proposition that the Commission has reason to believe that an emergency exists. Whether one applies the arbitrary capricious standard or the substantial evidence standard, it seems to me that what we are talking about in plain English is whether or not there is evidence from what reasonable persons acting as Commissioners could determine that an emergency exists.

Now, the Commission says that it has not adduced all of the evidence that it might have because of certain obligations of secrecy. Well, it seems to me that many of the propositions advanced by the plaintiff here could have been contradicted without resort to any secret or privileged information. The evidence of the plaintiff is clear and unequivocal that no emergency exists and that indeed the situation is normal and showing signs of becoming more normal as each day goes by.

It seems to me that a very important consideration in this analysis is that the fact to be determined is the existence or non-existence of an emergency.

Now, an emergency is not just your mine run ordinary fact. An emergency is something that is dramatic and obvious, ordinarily obvious, critical, and about which reasonable people ordinarily would not disagree.

So I am not of the view that I should be unduly deferential to the administrative determination here. I'm not called upon to judge some arcane question of commodities trading. I am frank to say that that would be beyond me. My grasp of this material is imperfect at best.

Rather, what I am called upon to assess is a garden variety factual question:

Is there as crisis over there across the street?

I don't think I need any extraordinary expertise to be able to come to some reasonable conclusion as to whether or not there is evidence from which the existence of such crisis could be concluded.

I think Mr. Angle has summed it up when he said that all the evidence indicate that there simply isn't any evidence of an emergency. I don't think I need to go on and spell out all of the reasons for believing that no emergency exists, because it simply would be to repeat the evidence that we have heard here this afternoon.

There simply is no evidence to the contrary, and having recently been reversed by the Court of Appeals for failure to apply the adverse inference rule in a case where they think I should have done it, I think it is not inappropriate for me to say that the failure of the defendant to adduce contrary evidence gives rise to a very strong implication that it does not have any.

I do not rest my decision on that fact, but I do think that this is a case where common sense, if not the rules of evidence, call for application of that rule.

Now I turn to the question of whether the plaintiff has standing. I think it does in a representative capacity, under the line of cases, of which the Sierra case is usually cited as the archtype, and in its own right, as having obligations to its members and to the public to see that commodities trading is carried on efficiently and without undue interruption.

As far as the element of irreparable harm is concerned, it seems to me that since we are dealing with a finite contract, it expires in a few days and the conditions that would otherwise exist in these next few days, absent the Commission order, can never be duplicated or reconstructed in any way, there is a sufficient showing of irreparable harm.

I find no public interest that argues against the grant of injunctive relief here, and, in fact, it seems to me that the

public interest, on the basis of uncontradicted evidence, requires the granting of injunctive relief.

It seems to me this is a case where a government agency has overreached itself. It has been called upon to justify its actions, and instead of attempting to do so has chosen to stand behind a rule of law which I think it misconceives.

I would be the first to say that I could well be wrong, and I assume that within a very short time the Court of Appeals will have an opportunity to review what we do here.

What I have just stated will constitute my findings under Rule 65, and I will enter a preliminary injunction enjoining the defendant from enforcing its order in regard to March 1979 wheat futures.

APPENDIX D.

UNITED STATES OF AMERICA

Before the Commodity Futures Trading Commission

In the Matter of the

March 1979 Wheat Futures Contract Traded on the Chicago Board of Trade

ORDER PURSUANT TO SECTION 8a(9) OF THE COMMODITY EXCHANGE ACT, AS AMENDED

The Commission has reason to believe that an emergency, within the meaning of Section 8a(9) of the Commodity Exchange Act, as amended, 7 U. S. C. § 12a(9) (1976), exists with respect to the March 1979 Wheat Futures Contract traded on the Chicago Board of Trade (the "Contract"). Specifically, the Commission has reason to believe that (a) a major market disturbance, which is preventing the market for wheat from accurately reflecting the forces of supply and demand, exists as a consequence of significant transportation and warehouse facility shortages, and (b) there exists a threatened manipulation or corner in wheat as a consequence of this disturbance and the combined long open positions presently being maintained in the Contract by a small number of speculative traders.

In this regard, market surveillance data and information collected by and reported to the Commission, and information acquired by the Commission from cash grain merchants, grain elevator operators, futures commission merchants and other sources, indicates that:

(1) a small number of speculative traders has established and, as of this date, is continuing to maintain large, potentially dominant, long open positions in the Contract;

(2) although only four trading days remained before expiration of trading in the Contract on March 21, 1979, this small number of speculative traders is continuing to maintain large long open positions in the Contract while at the same time other traders in the Contract are reducing their long open positions; as a result, the combined long positions of this small number of traders are comprising an increasingly large portion of the total open interest in the Contract as the last day of trading approaches, with that combined interest representing as of this date more than eighty percent of the total open interest in the Contract;

(3) the combined long open positions presently maintained in the Contract by this small number of traders substantially exceed the total quantity of wheat currently available in positions from which delivery can be made in fulfillment of the Contract;

(4) even as to wheat currently in deliverable position pursuant to the Contract, not all is acceptable or available for delivery on the Contract in that a portion of this wheat is of undeliverable variety or grade, or is owned by or committed to commercial users;

(5) there is a significant shortage of transportation facilities by which additional wheat may be moved into deliverable position during March 1979, the period allowed for deliveries to be made pursuant to the Contract;

(6) there is a significant shortage of warehouse facilities to accommodate any such additional wheat; and

(7) there is a perceived distortion of the price relationships between the Contract and other values of wheat.

Accordingly, for the purpose of maintaining orderly trading in, and the orderly liquidation of the Contract,

It Is Ordered that, pursuant to Section 8a(9) of the Commodity Exchange Act, the Chicago Board of Trade shall sus-

pend all trading in the Contract for the trading day, Friday, March 16, 1979.

It Is Further Ordered that any person that believes he or she is or may be adversely affected or aggrieved by this Order shall have a prompt hearing upon written submissions; accordingly, any person may immediately present in writing to the Commission for its consideration any comments or arguments concerning this Order or the issuance thereof and may present for Commission consideration any documentary or other evidence that person deems appropriate. Upon request, the Commission may, in its discretion, determine to conduct an oral hearing to permit the further presentation of information and views concerning any matters raised by any or all such persons. Nevertheless, this Order shall remain in effect unless and until modified or withdrawn by the Commission.

By the Commission:

/s/ Gary L. Seevers
Gary L. Seevers
Acting Chairman
Commodity Futures Trading Commission

Dated: March 15, 1979

APPENDIX E.

UNITED STATES OF AMERICA.
Before the Commodity Futures Trading Commission.

In the Matter of the
March 1979 Wheat Futures Contract
Traded on the Chicago Board of
Trade

SUPPLEMENTAL ORDER PURSUANT TO SECTION 8a(9) OF THE COMMODITY EXCHANGE ACT, AS AMENDED

On March 15, 1979, the Commission issued an Order stating that it had reason to believe that an emergency, within the meaning of Section 8a(9) of the Commodity Exchange Act, as amended, 7 U. S. C. § 12a(9) (1976), existed with respect to the March 1979 Wheat Futures Contract traded on the Chicago Board of Trade (the "Contract"). On that basis the Commission's Order directed the Chicago Board of Trade to suspend all trading in the Contract for the trading day, Friday, March 16, 1979.

Since that time, the Commission has obtained additional market surveillance data and information and has acquired additional information from futures commission merchants and other sources. Upon consideration of that additional information, and the information previously received, the Commission continues to believe that an emergency, within the meaning of Section 8a(9) of the Commodity Exchange Act, exists with respect to the Contract, and, in its judgment, further action is necessary and appropriate,

Accordingly, for the purpose of maintaining orderly trading in, and the orderly liquidation of the Contract,

IT IS ORDERED that, pursuant to Section 8a(9) of the Commodity Exchange Act, the Chicago Board of Trade shall:

(1) immediately terminate all trading in the Contract on March 19, 20, and 21, 1979, the three remaining trading days in the Contract;

(2) permit deliveries of wheat to be made in fulfillment of current open positions in the Contract through the last day permitted for delivery under the rules of the Chicago Board of Trade at the settlement price for the Contract in effect at the close of trading in the Contract on March 15, 1979; and

(3) settle all positions in the Contract remaining open as of the close of business on March 30, 1979, at the settlement price for the Contract in effect at the close of trading in the Contract on March 15, 1979.

IT IS FURTHER ORDERED that any person that believes he or she is or may be adversely affected or aggrieved by this Supplemental Order shall have a prompt hearing upon written submissions; accordingly, any person may immediately present in writing to the Commission for its consideration any comments or arguments concerning this Supplemental Order or the issuance thereof and may present for Commission consideration any documentary or other evidence that person deems appropriate. Upon request, the Commission may, in its discretion, determine to conduct an oral hearing to permit the further presentation of information and views concerning any matters raised by any or all such persons. Nevertheless, this Supplemental Order shall remain in effect unless and until modified or withdrawn by the Commission.

By the Commission:

/s/ Gary L. Seevers
Gary L. Seevers
Acting Chairman
Commodity Futures Trading Commission

Dated: March 16, 1979

Supreme Court, U.S.
FILED
APR 11 1980
MICHAEL RODAK, JR., CLERK

No. 79-1247

In the Supreme Court of the United States

OCTOBER TERM, 1979

BOARD OF TRADE OF THE CITY OF CHICAGO,
PETITIONER

v.

COMMODITY FUTURES TRADING COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE COMMODITY FUTURES TRADING COMMISSION IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1247

BOARD OF TRADE OF THE CITY OF CHICAGO,
PETITIONER

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COMMODITY FUTURES TRADING COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE COMMODITY FUTURES TRADING COMMISSION IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A17) is reported at 605 F.2d 1016.

JURISDICTION

The judgment of the court of appeals was entered on September 12, 1979, and a petition for rehearing was denied on November 15, 1979. The petition for a writ of certiorari was filed on February 12, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a determination by the Commodity Futures Trading Commission that an emergency exists in a commodity futures market pursuant to Section 8a(9) of the Commodity Exchange Act, 7 U.S.C. 12a (9), is a judgment committed by law to the Commission's discretion and therefore is exempt from judicial review.

STATEMENT

1. Prior to 1974, federal oversight of the commodity futures markets was extremely limited. The Commodity Exchange Act, 7 U.S.C. (1970 ed.) *et. seq.*, placed virtually total reliance on commodity exchanges licensed as contract markets to control trading and prevent abuses in the futures markets. By 1974, Congress recognized significant deficiencies in this regulatory approach. Accordingly, Congress extensively amended the Act and created the Commodity Futures Trading Commission as an independent regulatory agency to administer and enforce the Act's provisions.[1]

The 1974 amendments granted the Commission exclusive jurisdiction to regulate futures trading as well as traditional regulatory and enforcement powers.[2] Congress also recognized, however, that effective regulation of the volatile futures markets required special administrative power. Thus, Congress

[1] The Commodity Futures Trading Commission Act of 1974, Pub. L. No. 93-463, 88 Stat. 1389.

[2] See Sections 2(a)(1), 6(b), 6b, 6c, 8a(8) and 17 of the Act, 7 U.S.C. 2, 9, 13a, 13a-1, 12a(8) and 21.

authorized the Commission under Section 8a(9) of the Act, 7 U.S.C. 12a(9):

> to direct the contract market whenever it has reason to believe that an emergency exists, to take such action as, in the Commission's judgment, is necessary to maintain or restore orderly trading in, or liquidation of, any futures contract. The term "emergency" as used herein shall mean, in addition to threatened or actual market manipulations and corners, any act of the United States or a foreign government affecting a commodity or any other major market disturbance which prevents the market from accurately reflecting the forces of supply and demand for such commodity * * *.

Contract markets, like petitioner, have traditionally exercised self-regulatory emergency powers. During consideration of the 1974 amendments, however, concern was expressed to Congress that contract markets would not have been required to abide by emergency directives of the government unless Congress specifically authorized a federal agency to act as the final arbiter of market emergencies.[3] Accordingly, Congress enacted Section 8a(9) and emphasized that it intended the new emergency powers to be exercised through the "expert and impartial judg-

[3] See *Hearings on Review of Commodity Exchange Act and Discussion of Possible Changes Before the House Comm. on Agriculture*, 93d Cong., 1st Sess. 28 (1973) (remarks of Alex C. Caldwell); *Hearings on Small Business Problems Involved in the Marketing of Grain and Other Commodities Before the Subcomm. on Special Small Business Problems of the House Permanent Select Comm. on Small Business*, 93d Cong., 1st Sess., 1st Sess. 367 (1973).

ment [of] the Commission." S. Conf. Rep. No. 93-1194, 93d Cong., 2d Sess. 38 (1974).

2. After several months of extensive surveillance of the March 1979 Wheat Futures Contract (the "Contract"), the Commission, on March 15, 1979, invoked its emergency authority under Section 8a(9). In its emergency order the Commission stated (Pet. App. A26) that it had

> reason to believe that (a) a major market disturbance, which is preventing the market for wheat from accurately reflecting the forces of supply and demand, exists * * * and (b) there exists a threatened manipulation or corner in wheat * * *.

The Commission specified seven factors that formed the basis for its determination that an emergency existed (Pet. App. A26-A27):

> (1) a small number of speculative traders has established and, as of this date, is continuing to maintain large, potentially dominant, long open positions in the Contract;
>
> (2) although only four trading days remained before expiration of trading in the Contract on March 21, 1979, this small number of speculative traders is continuing to maintain large long open positions in the Contract while at the same time other traders in the Contract are reducing their long open positions; as a result, the combined long positions of this small number of traders are comprising an increasingly large portion of the total open interest in the Contract as the last day of trading approaches, with that combined interest representing as of this date more than

> eighty percent of the total open interest in the Contract;
>
> (3) the combined long open positions presently maintained in the Contract by this small number of traders substantially exceed the total quantity of wheat currently available in positions from which delivery can be made in fulfillment of the Contract;
>
> (4) even as to wheat currently in deliverable position pursuant to the Contract, not all is acceptable or available for delivery on the Contract in that a portion of this wheat is of undeliverable variety or grade, or is owned by or committed to commercial users;
>
> (5) there is a significant shortage of transportation facilities by which additional wheat may be moved into deliverable position during March 1979, the period allowed for deliveries to be made pursuant to the Contract;
>
> (6) there is a significant shortage of warehouse facilities to accommodate any such additional wheat; and
>
> (7) there is a perceived distortion of the price relationships between the Contract and other values of wheat.

Based on these considerations, the Commission directed petitioner to suspend all trading in the Contract for the following day, Friday, March 16, 1979 (Pet. App. A27-A28). Petitioner complied with this emergency order.

On March 16, the Commission continued to review market surveillance data and urged petitioner to take effective steps to eliminate the danger of disorderly trading in, or liquidation of, the Contract. Petitioner refused to take action that was satisfactory to the

Commission. Accordingly, that evening the Commission issued a supplemental emergency order under Section 8a(9) stating (Pet. App. A29) that it

> continues to believe that an emergency, within the meaning of Section 8a(9) * * * exists with respect to the Contract, and, [that] in its judgment, further action is necessary and appropriate.

The Commission directed petitioner to take steps to achieve an orderly liquidation of the Contract by requiring settlement of all open futures positions at the settlement price established on the exchange at the close of trading on the preceding day (Pet. App. A30). The Commission's order also provided that wheat deliveries should be made in fulfillment of open positions in the Contract at that price (*ibid.*).

In both its March 15 and 16 emergency orders, the Commission expressly invited any affected person to present to the Commission any written comments, arguments or evidence concerning its orders. The Commission stated that it would afford such persons a prompt hearing (Pet. App. A28, A30).

3. Petitioner did not submit any written evidence or otherwise seek a hearing before the Commission in response to this invitation. Instead, on Saturday, March 17, 1979, petitioner brought suit in the United States District Court for the Northern District of Illinois seeking to enjoin enforcement of the Commission's March 16 order. The complaint alleged that no market emergency existed and sought judicial review of the Commission's action under the Administrative Procedure Act. On Sunday, March 18, 1979, over the Commission's objection, the district court conducted a *de novo* evidentiary hearing on the complaint. Petitioner's five witnesses did not dispute any of the factual premises on which the Commission's orders were based. Instead, these witnesses disagreed with the Commission's conclusion that an "emergency" existed and that the price of the Contract was "distorted" (Pet. App. A5-A6).

The Commission contended in the district court that judicial review of its emergency determination was not available. In the alternative, the Commission argued that judicial review should be limited to whether the Commission's emergency orders, which were introduced into evidence, expressed a rational basis for the agency's action.

The district court ruled that the Commission's emergency determination was subject to judicial review (Pet. App. A22-A23). The court expressed the view that the question whether an emergency exists in a futures market is a "garden variety factual question" (*id.* at A23). The court refused to defer to the Commission's expert judgment and concluded that "there simply isn't any evidence of an emergency" (*id.* at A24). Accordingly, the district court enjoined the Commission from enforcing its March 16 order.

The court of appeals reversed, holding that "the merits of the Commission's emergency determination are precluded from judicial review by operation of 5 U.S.C. § 701(a)(2)" (Pet. App. A16). The court observed that 5 U.S.C. 701(a)(2) provides an exception to the normal presumption in favor of judicial

review for agency action that "is committed to agency discretion by law." In light of the principles established by this Court's decisions interpreting that provision, the court of appeals determined that judicial review of Commission emergency orders is foreclosed (Pet. App. A9-A10). The court explained (*id.* at A16):

> On the basis of the language which Congress employed, the structure of the enforcement provisions of the Act, the legislative history of the Act as amended, and the nature of the Commission's determination, we conclude that Congress intended to commit a Section 8a(9) determination to the Commission's discretion.

On November 15, 1979, the court of appeals denied petitioner's petition for rehearing and suggestion for rehearing en banc.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court. The decision does not create any conflict among the circuits because it resolves a question of first impression under a new statutory provision.[4] Moreover, the decision rests on the particular language and legislative history of the Commodity Exchange Act.

1. The Administrative Procedure Act provides that administrative action is reviewable by courts ex-

[4] The only other court to reach the issue presented here concurred "in the reasoning and the result" of the court of appeals in this case. *Equitable Trust Co.* v. *CFTC* [1977-1980] Comm. Fut. L. Rep. (CCH) ¶ 20,902 at 23,663-23,664 (W.D. Texas 1979).

cept where "statutes preclude judicial review" or the action is "committed to agency discretion by law." 5 U.S.C. 701(a)(1), (2). In construing the latter provision, the court of appeals correctly applied the principle, enunciated in the opinions of this Court, that Congress may implicitly preclude judicial review of agency action. *Southern Ry.* v. *Seaboard Allied Milling Corp.*, 442 U.S. 444, 454 (1979); *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 410 (1971).

When Congress has statutorily authorized special or emergency administrative action, a congressional intent to preclude review has been discerned from the language, design, and purpose of the statute. See *Morris* v. *Gressette*, 432 U.S. 491, 501 (1977); *Ewing* v. *Mytinger & Casselberry*, 339 U.S. 594, 600-602 (1950); *United States* v. *Southern Ry.*, 364 F.2d 86, 94 (5th Cir. 1966), cert. denied, 386 U.S. 1031 (1967); *Baltimore & O.R.R.* v. *Lambert Run Coal Co.*, 267 F. 776, 780-781 (4th Cir. 1920), aff'd on other grounds, 258 U.S. 377 (1922); *Daugherty Lumber Co.* v. *United States*, 141 F. Supp. 576, 581 (D. Ore. 1956). In particular, judicial review of agency action is inappropriate when the agency's determination involves the application of expertise, outside the normal scope of judicial experience, to complex economic or scientific factors,[5] or when the

[5] See, *e.g.*, *Local 2855, AFGE (AFL-CIO)* v. *United States*, 602 F.2d 574, 579 (3d Cir. 1979); *Hahn* v. *Gottlieb*, 430 F.2d 1243, 1249 (1st Cir. 1970); *Kletschka* v. *Driver*, 411 F.2d 436, 443 (2d Cir. 1969).

agency's exercise of discretion turns on permissive and inexact statutory terms.[6]

The authority Congress vested in the Commission under Section 8a(9) of the Act has all the characteristics of unreviewable discretionary authority. In granting the Commission emergency power, Congress recognized that the Commission would be regulating a "volatile and esoteric" marketplace (H.R. Rep. No. 93-975, 93d Cong., 2d Sess. 1 (1974)), and that the effective use of this power would therefore require the exercise of expert judgment. See S. Conf. Rep. No. 93-1194, 93d Cong., 2d Sess. 38 (1974). Congress also understood that emergency conditions in these markets cannot be prescribed with scientific precision. Thus, Congress chose to phrase Section 8a(9) in broad, permissive terms.

The Commission is authorized to take remedial action whenever it has "reason to believe" that an emergency exists. It may then enter an emergency order directing the contract market "to take such action as, in the Commission's judgment, is necessary to maintain or restore orderly trading in, or liquidation of, any futures contract." Section 8a(9) defines "emergency" broadly to include the mere "threat" of a manipulation or corner, as well as any "other major market disturbance."

These provisions were extensively examined by Congress in 1974. At that time, certain members of Congress warned that this authority was undesirable because the Commission could "take over the market

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[6] *Schilling* v. *Rogers*, 363 U.S. 666, 674 (1960); *Panama Canal Co.* v. *Grace Line, Inc.*, 356 U.S. 309, 318 (1958).

if it decides trading is fluctuating too greatly." H.R. Rep. No. 93-975, 93d Cong., 2d Sess. 165 (1974) (minority views). Congress thus understood that the new provision would authorize prophylactic measures with immediate and substantial market impact. See S. Conf. Rep. No. 93-1194, 93d Cong., 2d Sess. 38 (1974). Accordingly, Congress eliminated from Section 8a(9) certain language that would have authorized emergency remedies in non-emergency situations. See *id.* at 37-38. Congress nonetheless determined that emergency authority committed to the agency's discretion was necessary to ensure effective federal regulation of the futures markets. See Pet. App. A16.

Contrary to petitioner's contention (Pet. 11), the definition of emergency in Section 8a(9) does not evidence Congress' intent to provide for judicial review. As the court of appeals correctly observed, the statutory definition merely indicates that "Congress carefully designated the context in which a discretionary decision could be made" (Pet. App. A12). Moreover, even if Congress had chosen to define "emergency" in less broad terms than it used in Section 8a(9), that would not suggest that the Commission's emergency determination would be subject to judicial review. Judicial review may be precluded despite a "congressional decision to spell out in some detail certain limitations on the power it was conferring on the Executive." *Schilling* v. *Rogers*, 363 U.S. 666, 675 (1960). The congressional directive is merely "designed to provide guides for the [agency],

thereby lessening the administrative burden of decision." *Ibid.*[7]

2. The court of appeals also correctly recognized that judicial review of the Commission's emergency determination would frustrate the agency's performance of its regulatory responsibilities (Pet. App. A16). If judicial review were available, contract markets, brokers, and traders all could seek to enjoin the Commission's emergency determinations. These lawsuits could result in conflicting judgments, thereby subjecting exchanges and traders to inconsistent trading requirements.[8] Judicial review also

[7] The court of appeals recognized that action committed to the sole discretion of an administrative agency is nevertheless subject to judicial review to determine whether the agency acted "in a manner plainly repugnant to its statutory authority" (Pet. App. A9 n.6). Agency action would be reviewable on that basis if it were "made in excess of its delegated powers and contrary to a specific prohibition in the Act" (*Leedom* v. *Kyne*, 358 U.S. 184, 188 (1958)). As the court below noted, however, "Congress authorized the Commission to make the kind of determination it made in this case" (Pet. App. A9 n.6). Compare *SEC* v. *Sloan*, 436 U.S. 103, 112, 115, 117 (1978), where the agency transgressed specific time limitations on its statutory authority.

[8] The Commission has defended against two other court challenges to its determination that an emergency exists under Section 8a(9). The first suit was filed by traders holding "long" positions (*i.e.*, contracts obligating the traders to buy commodities) when the Commission declared an emergency in a December 1977 coffee contract. *Compania de Salvadorena* v. *CFTC*, 446 F. Supp. 687 (S.D.N.Y. 1978). Nearly two years later, another suit contesting the same emergency determination was filed by a trader who had held "short" positions (contracts obligating traders to sell commodities). *Equitable Trust Co.* v. *CFTC, supra.* If judicial review of the Commission's emergency order were available, the court in *Equitable Trust* would have required the Commission in late 1979 to adduce economic evidence demonstrating the existence of an emergency in December 1977. And if the district court had disagreed with the Commission's conclusion, countless traders whose contracts were liquidated two years previously could have been affected.

would inevitably disrupt the futures markets themselves. Traders would be forced to speculate on the outcome of a legal challenge to the Commission's action rather than basing their trading decisions upon economic factors. As this Court emphasized in *Southern Ry.* v. *Seaboard Allied Milling Corp., supra,* 442 U.S. at 457, "[t]he disruptive practical consequences of such a determination confirm our view that Congress intended no such result."

A determination under Section 8a(9) that a threat of market manipulation is present and that protective measures should be taken requires both consideration of complex economic factors and swift remedial action. If judicial review were available, however, the district court might seek to preserve the status quo and stay the Commission's emergency order. This would result in "the public [being] denied the speedy protection which Congress provided." *Ewing* v. *Mytinger & Casselberry, supra,* 339 U.S. at 601. And, even absent a stay order, "this allowance for independent judicial appraisal of the reasonableness" of the Commission's economic evaluation would constitute a "judicially created 'hazard to uniformity'" (*Southern Ry.* v. *Seaboard Allied Milling Corp., supra,* 442 U.S. at 460) that would

undermine the congressional purpose in empowering the agency to take definitive emergency action to protect the marketplace.[9]

3. Petitioner also argues (Pet. 13-15) that the Commission's exercise of its powers under Section 8a(9) violated the Due Process Clause because it resulted in a deprivation of property without an opportunity for a hearing. Petitioner did not raise this allegation in its complaint in the district court and it was not discussed by the court of appeals. Under these circumstances, review of the question by this Court would not be appropriate. *Hormel* v. *Helvering*, 312 U.S. 552, 556 (1941).

In any event, petitioner's constitutional attack is without merit. There is no substance to the claim that petition was denied a "hearing." The Commission specifically and repeatedly invited any person to submit comments or arguments concerning its emergency orders and announced that a prompt hearing would be afforded on request (Pet. App. A28, A30). Petitioner, however, deliberately failed to exhaust its

[9] In March 1979 Congress was extensively briefed on the Commission's interpretation that its emergency orders are not judicially reviewable. *Hearing on March Wheat Futures Trading on Chicago Board of Trade Before the Subcomm. on Conservation and Credit of the House Comm. on Agriculture*, 96th Cong., 1st Sess. 32-34 (1979). Since that time, Congress has not indicated any disagreement with the Commission's interpretation of the statute that it enforces. Cf. *Andrus* v. *Allard*, No. 78-740 (Nov. 27, 1979), slip op. 6; *United States* v. *Rutherford*, 442 U.S. 544, 554 (1979); *Saxbe* v. *Bustos*, 419 U.S. 65, 74 (1974).

administrative remedies. See *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50-51 (1938).

Furthermore, petitioner has failed to show that any liberty or property interest cognizable under the Due Process Clause was impaired by the Commission's order.[10] Unless contract law or federal statute provides a "legitimate entitlement" to, or "statutory expectancy" of, a property or liberty interest, the requirements of the Due Process Clause do not attach. See, *e.g.*, *Greenholtz* v. *Nebraska Penal Inmates*, 442 U.S. 1, 7 (1979); *Board of Regents of State Colleges* v. *Roth*, 408 U.S. 564, 577 (1972). Here, as petitioner concedes (Pet. 13), any entitlement it might have was "granted to it and its members under the Commodity Exchange Act." The statute does not provide petitioner or any of its members with a statutory expectation that trading in a particular futures contract will always be permitted until the expiration of the contract. Section 8a(9) unequivocally confers on the Commission authority to direct contract markets to take any action, including suspension or termination of trading, "as, in the Commission's judgment," is necessary to maintain or restore orderly

[10] Petitioner has not demonstrated that it suffered any economic harm as a result of the Commission's order and has not shown that it has standing to invoke a due process claim on behalf of its members. Petitioner's members include hedgers and speculators as well as long and short investors, who have diverse positions and interests. Such persons would be affected differently by any emergency order.

trading.[11] Indeed, under petitioner's own rules its members have no entitlement to trade if petitioner declares an emergency and terminates trading.[12]

Finally, even if petitioner had properly raised its due process claim in the lower courts and had asserted some statutory entitlement and deprivation of liberty or property, the balance struck by the Due Process Clause would fall in favor of the Commission in this case. See *Mathews* v. *Eldridge*, 424 U.S. 319, 334 (1976). The governmental interest involved here is the prevention of disruption and manipulation of the commodities futures markets. The importance of that function is well recognized. See Section 3 of the Act, 7 U.S.C. 5; *Chicago Board of Trade* v. *Olsen*, 262 U.S. 1, 40 (1923) ("manipulation of the market for futures on the Chicago Board of Trade * * * is a constantly possible danger"). The public interest in stable market conditions outweighs any private interest of petitioner and individual members in continued trading of a particular contract. Accordingly, the Commission's invitation to affected persons to

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[11] In any event, an emergency order of the Commission does not "take" property from any trader. The Commission does not seize the property of any trader or suspend any license. The Commission merely directs the market to take corrective steps needed to ameliorate emergency conditions.

[12] Petitioner has periodically invoked its emergency rules to suspend and otherwise affect trading in futures contracts. See *Lagorio* v. *Board of Trade of City of Chicago*, 529 F.2d 1290, 1292 (7th Cir. 1976); *Case & Co.* v. *Board of Trade of City of Chicago*, 523 F.2d 355, 360 (7th Cir. 1975).

submit comments or arguments concerning its emergency orders (an invitation that petitioner ignored) provided the process that was due.[13]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[13] Moreover, to the extent that "[e]xecutive discretion is not limited, there is no need for a hearing." *Arnett* v. *Kennedy*, 416 U.S. 134, 181-182 (1974) (White, J., concurring in part and dissenting in part) (collecting cases). Since the Commission's discretion in invoking Section 8a(9) is not limited, a hearing on its decision is not required. Of course, as the court of appeals recognized (Pet. App. A9 n.6), to the extent that Commission action has not been committed to agency discretion by law, judicial review and a hearing are available. See generally *Langevin* v. *Chenango Court, Inc.*, 447 F.2d 296, 303-304 (2d Cir. 1971).

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IN THE

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OCTOBER TERM, 1979

NO. 79-1247.

BOARD OF TRADE OF THE CITY OF CHICAGO,
Petitioner,

vs.

COMMODITY FUTURES TRADING COMMISSION,
Respondent.

MOTION OF THE CHICAGO MERCANTILE EXCHANGE FOR LEAVE TO FILE AS AMICUS CURIAE AND BRIEF OF CHICAGO MERCANTILE EXCHANGE AS AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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MOTION OF THE CHICAGO MERCANTILE EXCHANGE FOR LEAVE TO FILE AS AMICUS CURIAE

The Chicago Mercantile Exchange respectfully moves, pursuant to Rule 42(3), for leave to file the attached brief amicus curiae in support of the Petition for a Writ of Certiorari heretofore filed by the Board of Trade of the City of Chicago. Movant was originally part of a group of commodity exchanges that intended to file a single amicus brief and as such was refused consent by the Solicitor General, because of the lateness of their request.

Leave is sought, because the Board of Trade's Petition does not deal with impact of the CFTC's challenged order on those commodity exchanges that were not the direct target of that order. If this motion is granted, the Chicago Mercantile Exchange believes it will be able to contribute substantially to this Court's understanding of the scope and breadth of the impact of such orders and to demonstrate the need to preserve a judicial safeguard against the CFTC's enlargement of its jurisdiction and powers.

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Respondent.

BRIEF OF CHICAGO MERCANTILE EXCHANGE AS AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

PRELIMINARY STATEMENT

A Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit was filed on February 12, 1980, by the Board of Trade of the City of Chicago ("Board of Trade"). It sought review and reversal of the decision in *Board of Trade of the City of Chicago* v. *Commodity Futures Trading Commission,* Appeal No. 79-1278, 605 F. 2d 1018 (7th Cir. September 12, 1979), in which the Court of Appeals held that the Commodity Futures Trading Commission's declaration that a market "emergency" exists is exempt from judicial review.

The Chicago Mercantile Exchange in accordance with the contemporaneous motion filed herewith seeks leave of Court to enter its appearance as amicus curiae to urge that the Petition of the Board of Trade be granted and to submit, at a later date, a brief on the merits urging rejection of certain erroneous legal principles fashioned by the Court of Appeals in reaching its decision.

The Chicago Mercantile Exchange urges that the Petition of the Board of Trade be granted, because the Court of Appeals decided an important question of federal law which has yet to be resolved by this Court—whether the Commodity Futures Trading Commission's decisions of law and arbitrary and capricious factual determinations are subject to judicial review.

NATURE AND INTERESTS OF THE CHICAGO MERCANTILE EXCHANGE

The Chicago Mercantile Exchange ("CME") is the world's second largest commodities futures market. It conducts futures trading in agricultural products, metals, currencies, and debt instruments. In 1979, trading volume was 20 million contracts valued at many billions of dollars.

The emergency action of the CFTC which is the subject of the Petition for a Writ of Certiorari was not directed at trading on the Chicago Mercantile Exchange, however, it had consequences for all exchanges. It directly affected those traders who had intermarket spreads or hedges. For example, certain cattle feeders, regularly take related positions in grains and in either live cattle or feeder cattle in order to protect against unexpected fluctuations in the relationship of the costs of feeding cattle and the ultimate value of the fed cattle. That portion of the transaction relating to cattle would have been done on our exchange while the portion relating to grain would have been done on the Board of Trade. The hedger is put in an impossible situation when one-half of his transaction continues to fluctuate

in accordance with market forces, whereas the other portion is fixed at a price level determined by the CFTC.

The interest of the CME is not limited to the particular instance decided by the Court of Appeals. Since that date, the Commodities Futures Trading Commission again invoked § 8a(a) as authority to halt futures trading in circumstances which do not constitute a market "emergency" as that term is expressly defined by Congress.

The CFTC's misuse of its "emergency" power without the check of an effective appeal injures futures markets and traders. Those individuals who use futures markets in order to reduce their business risks must be assured that arbitrary and capricious actions of the CFTC do not interfere with the regular functioning of futures markets. The Court of Appeals' decision improperly unbridles the CFTC thereby undermining confidence in the functioning of futures markets.

THE ISSUES FOR REVIEW

1. Is the CFTC's interpretation of the boundaries of "emergency" as defined at section 8a(9) of the Commodity Exchange Act [7 U. S. C. § 12a(9)] immune from judicial review?
2. May the CFTC arbitrarily and capriciously declare an "emergency" and frame orders in response thereto?

ARGUMENT

The Court of Appeals' decision is completely at odds with the standards of judicial review applicable to other federal agencies. *Citizens to Preserve Overton Park* v. *Volpe,* 401 U. S. 402 (1971). The Supreme Court has not specifically passed on the scope of judicial review of CFTC "emergency" declarations and actions and it is imperative that it act promptly to overrule the decision of the Court of Appeals for the Seventh Circuit—which is the focal point of commodity trading.

The Commission was granted "emergency" powers by the Commodity Futures Trading Commission Act of 1974, which added section 8a(9) to the Commodity Exchange Act. That section imposes three distinct prerequisites to the exercise of "emergency" powers. The first is that the circumstance to which the Commission is responding is an "emergency" as defined by the section. For example, "emergency" is defined to include "any act of the United States . . . affecting a commodity . . . which prevents the market from accurately reflecting the forces of supply and demand for such commodity . . . ." A price freeze is a clear example of this category of "emergency" since the forces of supply and demand are precluded from operating.

After the Court of Appeals' declaration of immunity from review, which is the subject of this Petition, the CFTC broadly interpreted a section 8a(9) "emergency" to include any act of the United States which might cause confusion among traders regarding supply and demand factors. President Carter's announced grain embargo of Russia was declared an "emergency" although the President's action merely shifted the supply/demand curves. The embargo did not prevent the market from accurately reflecting trader's estimates of the forces of supply and demand. The Court of Appeals' refusal to review the initial unlawful expansion by the CFTC of its emergency authority encouraged this subsequent additional enlargement.

The second prerequisite to the exercise of "emergency" power is that the Commission "have reason to believe that an emergency exists." For example, while the Commission has power to act in the event of a threatened market manipulation, the question remains whether on the facts then available to the Commission, it has "reason to believe" that a market manipulation is threatened. The decision of the Court of Appeals insulates from review the Commission's factual determination in that the Court of Appeals sanctioned the Commission's refusal to come forward with any basis for its judgment that an emergency existed.

This case came before the Court of Appeals on a hearing record where "clear and convincing" evidence had been submitted by the Board of Trade which convinced the District Court that it was arbitrary and capricious for the Commission to have declared the existence of an "emergency" within the meaning of section 8a(9). The Commission had refused to provide any rebuttal to the charge that it had acted arbitrarily, capriciously and in contravention of the statute. Instead it asserted that its order was "not judicially reviewable." (605 F. 2d at 1019).

On appeal, the Commission backed away from its unqualified assertion of immunity and conceded:

> [T]hat agency action committed to agency discretion is nevertheless judicially reviewable where such action is challenged on constitutional grounds, or upon a claim that the agency has acted in bad faith or in a manner plainly repugnant to its statutory authority. (605 F. 2d at 1021, n. 6)

The Court of Appeals refused the concession and held that mere recitation by the Commission that its action was in accord with section 8a(9) shielded the action from judicial review:

> [T]he merits of the Commission's emergency determination are precluded from judicial review . . . (605 F. 2d at 1025)

The Court of Appeals discarded the findings of the District Court, based on evidence, and gave sole credence to the Commission's conclusory recitations in its order of March 15, 1979. (605 F. 2d at 1018-1019)

The third prerequisite to an "emergency" action is that the contemplated curative order be "necessary to maintain or restore orderly trading in, or liquidation of, any futures contract." The section clearly affords the Commission wide latitude in its choice of remedy, but it does require the Commission to exercise "judgment." The Court of Appeals has insulated the Commission's exercise of judgment from any subsequent review by

prohibiting inquiry into whether the order resulted from an exercise of judgment or was merely an arbitrary and capricious act motivated, for example, by self interest, political considerations, or matters unrelated to the objectives of the Act.

CONCLUSION

The decision of the Court of Appeals has been taken by the CFTC as a license to regulate beyond congressionally imposed limits in the guise of responding to "emergencies." The uncontrolled expansion of the CFTC's jurisdiction is clearly contrary to consistently expressed congressional concern regarding this agency and contrary to the self-regulatory concept which permeates the Act. We urge that the Board of Trade's Petition for a Writ of Certiorari be granted.

Respectfully submitted,

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BOARD OF TRADE OF THE CITY OF CHICAGO,
Petitioner,

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COMMODITY FUTURES TRADING COMMISSION,
Respondent.

MOTION OF MID AMERICA COMMODITY EXCHANGE, BOARD OF TRADE OF KANSAS CITY, MISSOURI AND MINNEAPOLIS GRAIN EXCHANGE FOR LEAVE TO FILE BRIEF AS AMICI CURIAE

and

BRIEF OF MID AMERICA COMMODITY EXCHANGE, BOARD OF TRADE OF KANSAS CITY, MISSOURI AND MINNEAPOLIS GRAIN EXCHANGE, AS AMICI CURIAE, IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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MOTION OF MID AMERICA COMMODITY EXCHANGE, BOARD OF TRADE OF KANSAS CITY, MISSOURI AND MINNEAPOLIS GRAIN EXCHANGE FOR LEAVE TO FILE BRIEF AS AMICI CURIAE

The named exchanges respectfully move, pursuant to Rule 42(3), for leave to file the attached brief *amici curiae* in support of the Petition for Write of Certiorari. Movants obtained the consent in writing of Petitioner to the filing of their brief but were refused consent by the Solicitor General because of the lateness of their request. Counsel respectfully advise the Court that the extreme activity in commodity futures markets in recent weeks has occasioned inordinate demands on their time and delayed preparation of their brief as *amici curiae*.

In support of their Motion for leave to file, movants state:

The three exchanges with the Chicago Mercantile Exchange (expected to file a separate brief amicus, and the Petitioner, Chicago Board of Trade, account for all of the futures trading in the grains and livestock in the United States and for over ninety-five percent of all trading in agricultural commodities. The pricing mechanisms of these futures exchanges form a basis for pricing sales in both the domestic and export markets of substantially all wheat, corn, oats and the soybean complex. Sales of these commodities are in the tens of billions of dollars annually.

Futures trading on each of the four exchanges is inextricably related to that on the Chicago Board of Trade through intermarket spreading, hedging and arbitrage transactions. The action of the Commodity Futures Trading Commission forming the subject of the Petition for Writ would directly have affected the four moving exchanges. The dollar volume of futures trading in agricultural commodities on the four exchanges exceeds a hundred billion dollars annually.

Although not directly affected by the challenged order of the Commission, all of the exchanges were affected by its order of March 15, 1979 which stopped trading in March wheat on March 16th on the Chicago Board of Trade. Three of the moving exchanges trade contracts in March wheat and the effect on them of the closing of the principal market at the Chicago Board of Trade was direct and substantial.

Movants believe that the Petition fails adequately to develop the awesome import of the Commission's order, the constitutional abridgements which inhere in it, its arbitrary and capricious character, the repugnancies between it and the express mandates of the Act, and its harmful effects on the trade and members of the trading public,

especially smaller and less well capitalized traders who most often suffer severe financial losses as a result of an untoward market condition such as the Commission would have imposed.

These aspects of the order are developed in amici's brief and provide compelling warrant for granting the writ and, should the writ be granted, important perspective in the construction of a new (1974) statutory provision not heretofore subject to this Court's scrutiny.

For the foregoing reasons, but principally because of the extreme importance of the futures markets to the well being of the national economy in these critical days of turmoil in both domestic and international commodity markets, we believe all relevant arguments should be heard by the Court, now called upon to decide whether to hear an issue directly affecting markets which dwarf the securities industry in their dollar volume and which act to determine the price of the daily sustenance of almost every human being on earth.

Respectfully moved,

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PRELIMINARY STATEMENT

A Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit was filed on February 12, 1980, by the Board of Trade of the City of Chicago (Board of Trade). It seeks review and reversal of the decision in *Board of Trade of the City of Chicago* v. *Commodity Futures Trading Commission*, Appeal No. 79-1278, 605 F.2d 1018 (7th Cir. September 12, 1979), in which the Court of Appeals held that the Commodity Futures Trading Commission's (Commission) determination

that a market "emergency" exists is exempt from judicial review.

The MidAmerica Commodity Exchange, Kansas City Board of Trade and Minneapolis Grain Exchange, in accordance with their Motion filed contemporaneously herewith, have sought leave to file their appearances as amici curiae to urge that the Petition of the Board of Trade be granted and to submit, in accordance with the Rules, a brief on the merits urging reversal of the decision of the Court of Appeals.

The named exchanges, as amici, urge that the Petition of the Board of Trade be granted because the Court of Appeals decided an important question of federal law which has not been and should be decided by this Court—viz., whether a determination by the Commission pursuant to Section 8a(9) of the Commodity Exchange Act (Act), 7 U.S.C. Section 12a(9), that an "emergency" exists and the action it takes as a consequence of that determination are subject to judicial review.

NATURE AND INTERESTS OF THE EXCHANGES, AMICI

The Chicago Mercantile Exchange (CME), which is expected to file a separate brief amicus, is the world's second largest commodities futures market. It conducts futures trading in agricultural products, metals, currencies and debt instruments. In 1979, trading volume was 20 million contracts valued at hundreds of billions of dollars. With the Chicago Board of Trade and the Chicago Mercantile Exchange, the MidAmerica Commodity Exchange, the Kansas City Board of Trade and the Minneapolis Grain Exchange account for all futures trading in the United States in the grains, livestock and in the soybean com-

plex.[1] Such trading represents over 95% of all futures trading in domestic agricultural products.[2]

The emergency action of the Commission which is the subject of the Petition for Writ of Certiorari was not directed at trading on the Chicago Mercantile Exchange; however, it directly affected those of its traders and members of the industry and of the public generally who held intermarket spreads or hedges in grains and livestock. For example, certain cattle and hog feeders regularly take intermarket spreads or hedge posititons in the feed grains and soybean complex and in either live cattle or hogs in order to protect against fluctuations in the costs of feed and in the price received in the cash market on sale of the animals at the end of the feeding period. That portion of the transaction relating to cattle or hogs would be effected on the Chicago Mercantile Exchange while the portion relating to grain would be placed on the Board of Trade. When a part of, i.e., one "leg" of a hedger's transaction continues to fluctuate in accordance with market forces, i.e., the cattle or hog price, whereas the grain leg is fixed at a price level set by the Commission, the hedger is placed in an exposed position so that prices he pays or receives are, as to a part of his spread, determined not by supply and demand but by governmental fiat and he is thus placed at risk by the Commission's action.[3]

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[1] The soybean complex includes soybeans, soya meal and soybean oil.

[2] The only domestic agricultural products not traded on the five exchanges are cotton and orange juice concentrate.

[3] Wheat not usually being considered a feed grain, the case at bar, involving March wheat, is atypical to the example. However, an example did occur when following the March wheat incident and the decision of the Court of Appeals, the Commodity Futures Trading Commission in January, 1980, again invoking its alleged "emergency" powers under Section 8a(9) of the Act, halted futures trading in all grains and the soybean complex for two days while permitting livestock and other futures to continue trading.

The MidAmerica Commodity Exchange, Kansas City Board of Trade and Minneapolis Grain Exchange were not subject to the Order directed to the Chicago Board of Trade but all have contracts in March wheat and the cessation of trading in the March contract on the Chicago Board of Trade on March 15 had a direct effect on the volume of wheat traded on these exchanges on that day and on the ability of their markets accurately to reflect the forces of supply and demand on the price of their March wheat contracts.[4] Spreading transactions in wheat between Kansas City and Chicago, particularly among commercial users of the market, occur in substantial volume and between Minneapolis and Chicago to a lesser degree. The order of the Commission which stopped trading in the Chicago March contract, i.e., on one leg of the spread, had a disruptive effect on the March contracts on the other exchanges, deprived traders on the latter exchanges of the ability to remove or roll over to another contract month their Chicago legs and, since Chicago was frozen at a price as of the close of the market on the day preceding the stopping of trading, occasioned losses or profits in the spreads unrelated to *market forces which were operating in wheat notwithstanding the cessation of trading in Chicago.*

The interests of the amici exchanges are not limited to the particular case decided by the Court of Appeals. The case has far reaching implications for an industry which annually trades futures contracts having a value of a trillion dollars and which more perhaps than any other form of mercantile trading depends upon the integrity of

[4] The MidAmerica Commodity Exchange market in March wheat is derivative to that on the CBOT and its directors suspended trading in the March contract when trading was suspended at the CBOT.

the contracts being traded and their terms, inexorably fixed by exchange rules based on almost a century and a half of trade practice and experience, terms, moreover, approved by the Commission.

The alleged abuse by the Commission of its "emergency" power and the non-reviewable status given the action of the Commission by the decision of the Seventh Circuit without exaggeration constitute the gravest threat to the integrity of the futures markets since their inception. The decision paves the way to continuing abuse of that power, subject to review by no court notwithstanding that every use of that power, perforce, must deprive traders of contract rights long held inviolable. Those persons who use the futures markets for price determination purposes, and substantially all of the tens of billions of dollars of grain sold in commercial channels both domestically and for export is sold at prices based on prices of futures contracts traded on the named exchanges, must be assured that those prices reflect supply and demand, and not what the government thinks the price ought to be.[5] So must

[5] Notably the Commission's Order of March 16 set a price of $3.76-¾ per bushel as the price at which all March contracts were to be settled. Petitioner's App. 30A. This price was the *market's* settlement price at the close on March 15th. If this price did not reflect supply and demand *at that time,* it seems hard to believe the government would order contracts for some ten million bushels of March wheat to be settled at such price! Conversely, that price could not reflect the free market price for wheat on March 19, 20 and 21, the three remaining trading days of the contract on which the order would have stopped trading. It is a known fact that as the trading draws to a close the differential between cash and futures prices narrows to a figure representing the cost of delivery, i.e., inspection, grading, etc. The Order would have interfered with this normal occurrence.

the farmers and other producers, the feed mills and processors who use the futures markets to hedge their production have assurance that the markets will function regularly, that they may hedge and lift and move hedges in markets free of improper governmental interference with the continued functioning of these markets according to their contract terms.

QUESTIONS PRESENTED FOR REVIEW

1. Whether the exemption from judicial review created under Section 701(a)(2) of the Administrative Procedure Act for Agency Action committed to agency discretion applies to emergency determinations of the Commission under Section 8a(9) of the Act.

2. Whether the Commission's action is judicially reviewable because it abridges constitutional rights.

3. Whether the Commission's action is judicially reviewable because repugnant to the Commission's statutory authority.

ARGUMENT

I

THE DECISION OF THE COURT BELOW IS AT ODDS WITH STANDARDS OF JUDICIAL REVIEW APPLICABLE TO FEDERAL AGENCIES AS ESTABLISHED BY THIS COURT. THE EXEMPTION FROM JUDICIAL REVIEW FOR AGENCY ACTION COMMMITTED TO AGENCY DISCRETION DOES NOT APPLY TO THE COMMISSION IN THIS CASE.

Amici adopt petitioner's argument on this, its first point, and would expand upon its argument that Section 8a(9) of the Commodity Exchange Act, at issue here, is not "drawn in such broad terms" that in the case at bar "there is no law to apply" and hence no judicial review is permissible. Cf. *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402, 410 (1971).

It is unquestioned that the definition of an "emergency" in Section 8a(9) of the Act is limited in scope and that such limitation is given emphasis. First the term is specifically limited by definition:

> "The term 'emergency' as used herein shall mean, in addition to threatened or actual market manipulations and corners, any act of the United States or a foreign government affecting a commodity or any other major market disturbance which prevents the market from accurately reflecting the forces of supply and demand for such commodity. * * *"

Its narrow parameters are then brought into sharp relief by establishing them as a subset of the multi and varied circumstances, peculiarly within the ken and competence of the several exchanges, which occur during trading and

which may endanger the stability or integrity of a market and hence require exchange emergency action:

> "Provided, that nothing herein shall be deemed to limit the meaning or interpretation given by a contract market to the terms 'market emergency', 'emergency', or equivalent language in its own bylaws, rules, regulations or resolutions. [As added by Act of October 23, 1974 (Commodity Futures Trading Commission Act of 1974), effective April 21, 1975, Sec. 215, 88 Stat. 1040.]"[6]

The portion of the statute first quoted defining "emergency" is "a plain and explicit bar", *Citizens to Preserve Overton Park* v. *Volpe,* 401 U.S. 402, 411 to the exercise of the Commission's "emergency" power except in the limited circumstances delineated within the definition and thus is to be distinguished from the latter portion's eschewal of any limitation of the circumstances under which the several exchanges may take emergency action.[7]

With such a definition of the term "emergency", "(p)lainly there is 'law to apply' and thus the exemption (from judicial review) for action 'committed to agency discretion' is inapplicable." *Citizens to Preserve Overton Park* v. *Volpe, supra,* 401 U.S. at 413.[8] However, the

[6] Congress specifically delegated authority to the exchanges to take emergency action. Cf. Section 5a(12) of the Act.

[7] It bears noting that Congress' grant of "emergency" power to the Commission over futures markets can be exercised by the Commission only through the agency of the exchanges, further amplifying the concept of *exchange* regulation of trading implicit in the congressional debates on the 1974 amendments.

[8] It thus escapes us how the Court of Appeals, acknowledging the narrow definition of emergency, *Board of Trade* v. *Commodity Futures Trading Commission,* 605 F.2d 1016, 1022, could fail to find a "law to apply" and thus render inapplicable the exemption created for action "committed to agency discretion." *Overton, supra,* at 413.

Court of Appeals, faced with the law enunciated by this Court in *Overton* and the strict definition of emergency in 8a(9) had to and did cast about for some other term in the statute stated, at least facially, so broadly as to afford it a loophole to bring the case within the exception. It fastened, and we argue, erroneously, upon the terms "maniupulations" and "corners" and "a market disturbance which prevents the market from accurately reflecting the forces of supply and demand." *Board of Trade* v. *Commodity Futures Trading Commission,* 605 F.2d 1016, 1022, n. 8.

Amici submit that if there are any terms of art that are well known, defined and peculiarly indigenous to commodity trading, they are "corners" and "manipulations". Nor are definitions of these terms solely within the province of the industry. Frequent interpretations are found in the cases. Cf. *United States* v. *Patten,* 187 F. 664, 668 (1911); *Peto* v. *Howell,* 101 F.2d 353, 357 (7th Cir. 1938); *Great Western Food Distributors* v. *Brannan,* 201 F.2d 476, 478 (7th Cir. 1953); *Santa Fe Industries, Inc.* v. *Green,* 430 U.S. 462 (1977); *Ernst and Ernst* v. *Hochfelder,* 425 U.S. 185 (1976); *Valkart Bros.* v. *Freeman,* 311 F.2d 52, 58 (5th Cir. 1962); *General Foods Corp.* v. *Brannan,* 170 F.2d 220, 231 (7th Cir. 1948). Nor is the term "market disturbance" vested with some peculiar, arcane connotation known only to the Commission; rather the reported cases construing corners and manipulations are replete with examples of so-called market disturbances. As the trial judge remarked:

> "Now an emergency is not just your mine run ordinary fact. An emergency is something that is dramatic and obvious, ordinarily obvious, critical about which reasonable people ordinarily would not disagree. * * * I'm not called upon to judge some arcane question of commodities trading. * * * Rather, what

> I am called upon to assess a garden variety factual question. * * *'' Petitioner's App. A23.

Accordingly, it is submitted that the reasoning employed and relied upon by the court below and recited in its footnote 8 is incorrect; and, in view of the precision found in the drafting of the statute, appears at best as an attempt to secure an end result, for whatever reason, by treating industry terms of art as amorphous in connotation or as so esoteric as to escape that intelligence common to the futures industry and the bench. The ''emergency'' action of the Commission is therefore subject to judicial review and the decision below should be reviewed and reversed, and the unbridled authority[9] it affords the agency to interpose its judgment in markets of worldwide significance thus subjected to the restraints and safeguards only the judiciary can provide.

II.

THE COMMISSION'S ACTION IS JUDICIALLY REVIEWABLE BECAUSE IT ABRIDGES CONSTITUTIONAL RIGHTS.

It cannot be disputed that the action which the Commission directed the exchange to take pursuant to Section

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[9] Also countering the Commission's present claim of unbridled, unreviewable authority in emergency matters is the language in Section 2(a) of the Act which provides: "Nothing in this section shall supercede or limit the jurisdiction conferred on courts of the United States or any State." This provision, absent in the House bill, was added by the Senate to clarify that the jurisdiction of the courts, unlike that conferred on state agencies by inconsistent state laws which the Act pre-empts, was expressly retained. Conf.R. No. 93-1383, p. 35-36; Conf.R. No. 93-1194, p. 35-36; S.Rep. No. 93-1131, 93d Cong., 2d Sess., p. 6. This clear intent to preserve court jurisdiction is not otherwise qualified in the legislative history for circumstances requiring emergency Commission action.

8a(9) would have resulted in the taking of property, we submit, in derogation of traders' rights of due process. Specifically the Commission's order of March 16, 1979 provided that the Chicago Board of Trade shall:

> ''(1) immediately terminate all trading in the (March wheat) contract on March 19, 20 and 21, 1979, the three remaining trading days in the Contract;
>
> (2) permit deliveries of wheat to be made in fulfillment of current open positions in the Contract through the last day permitted for delivery under the rules of the Chicago Board of Trade at the settlement price for the Contract in effect at the close of trading in the Contract on March 15, 1979; and
>
> (c) settle all positions in the Contract remaining open as of the close of business on March 30, 1979, at the settlement price for the Contract in effect at the close of trading in the Contract on March 15, 1979.'' Petitioner's App. A30.

Part (1) of the Order would have abridged the rights of all of the longs and shorts in the March wheat option voluntarily to offset their contracts in the market on March 19, 20 and 21 rather than to stand for or make delivery. The value of the wheat represented by the open interest held by these longs and shorts approximately 30 million dollars. From the start of trading in the March 1979 contract in March of 1978 every trader knew that trading would continue until March 21, 1979. This was one of the terms of the contracts each bought or sold. At the close on March 15th all of the producers, processors, exporters, etc., as well as speculators who were still in the market, knew that they had four trading days left within which to offset their positions in the wheat pit at prices which varied from minute to minute and even more often

as price determining forces worked in the market. Obviously offsetting shorts expected to buy in their short positions during the last four trading days at prices below the settlement price on the 15th while hedgers expected to lift their hedges during these four days at prices which would also act as the pricing basis for sales of their hedged cash wheat in commercial channels. Had they not so expected, they would not have stayed short through the 15th. Similarly the market prior to the Commission's order had been freely trading. Speculative longs expected or hoped to sell out their positions at higher prices while long hedgers expected to lift their hedges at prevailing prices which also acted as the basis for their purchases in commercial channels. Other commercial longs expected to stand for delivery to use the delivered wheat for their commercial purposes.

By its order terminating trading on the 16th, Petitioner's App. A26, and the later enjoined order, the Commission assayed to interdict the foregoing rights, arbitrarily freeze the market at the settlement price of $3.76¾ on March 15th, and preclude the holders of contracts for 9 million bushels of wheat, the vast majority of whom had no relationship whatsoever with the small number of speculative traders noted in the Commission order, Petitioner's App. A26, from fulfilling their market expectations and purposes. Without notice, by terminating trading through its orders, the Commission would have forced *all* longs, including small speculators drawn from the general public, into the hapless position of being unable to offset their positions in the market on the last four days when most of them expected to be able to do so and thus being forced into a position of taking delivery of such wheat as the shorts delivered. It is appalling to consider what this might

have meant to a small speculator with two thousand dollars of his capital posted as margin on say two contracts of wheat and who is told by his broker that the Commission has terminated trading in the contract and that he must be prepared to accept delivery of 10,000 bushels of wheat at a cost of over $35,000. If delivery so occurred, the individual would be forced into cash grain channels to dispose of his wheat in a transaction that might cost him hundreds if not thousands of dollars in market variation let alone additional commission, storage, insurance and interest charges.

Such an outstanding state of affairs have been foisted upon every long in the market had the order of the Commission not been set aside.

Nor was the mischief confined to part (1) of the order. Parts (2) and (3) permitted shorts, normally the commercials, to enjoy the best of all possible worlds, in common parlance, to work both sides of the street from the 15th through the last day for delivery in the month, viz., March 29th. Holding the cash article and being assured of a price frozen by the Commission at $3.76¾, shorts could await expected higher prices in the cash market during the two week period. If such developed, they would sell their wheat at the higher cash price and have their futures contract settled at the $3.76¾ figure set by the Commission (Part (3) of the order). If, conversely, the cash price declined, they would deliver their wheat on their short contracts at $3.76¾ and, on the way to the bank, laugh at hapless longs forced into taking delivery, longs who had been denied their right and ability to offset their long positions in the pit because of the early termination of trading required by Part (1) of the Commission's order.

In sum, the Commission's order would have deprived all traders desiring to do so of their rights under their contracts to offset for the three trading days of the 19th, 20th and 21st. It also would have conferred special favor and benefit on the shorts while imposing an enormous burden on those longs who, never wanting or even able to accept delivery, would have had it foisted upon them. Meanwhile, the contracts rights of longs who expected to stand for delivery for commercial or trading purposes would have been taken by permitting shorts to default with impunity and settle their contracts at the price arbitrarily set by the Commission's fiat.[10]

In our American system, government cannot take property without an opportunity for a hearing and so the petitioner is entirely correct in arguing that the emergency order denies to its members and the general public who use its markets the constitutional rights of due process because the taking it occasions is at no point subject to judicial scrutiny.

Significantly, the right to judicial review of this constitutional concern is not affected by the niceties of Section 701(a)(2). For one thing, the provisions of this section

[10] The arbitrary, capricious and constitutionally defective character of the Commission's order is brought into sharp contrast by the Board of Trade's order, 605 F.2d 1019, n. 2, whereunder trading continued for the contract period "for liquidation only". Thereby, traders who wished to offset and those who wished to stand for or make delivery could do so, all at prices set by the free market. The exchange's order abridged no one's right. Its only prohibition was directed against the taking of new positions in the market except for shorts with grain in deliverable position. That the Commission knew of the exchange's Order when its challenged Order of March 16th was issued compounds the arbitrary and capricious character of the latter and heightens the need for judicial review.

do not bar judicial review when, as here, the challenge is on constitutional grounds, 605 F.2d at 1021, n. 6.[11] Moreover, the taking complained of here does not result so much from the Commission's determination of the existence of an emergency as it does from the substance of the order fashioned by the Commission in the face of that determination. It is only the former—"the merits of the Court's emergency determination", 605 F.2d at 1025—which the Seventh Circuit found unreviewable. The substance of the action which the Commission required the exchange to take is a matter quite separate from the "emergency" determination and none of the appellate court's analyses of the history, structure and purpose of the Act suggests either that courts are unsuited to review the substance of such orders or that the Congress intended to preclude such review.[12] Indeed, it would be anomalous were the legislature to have shielded Commission remedies from judicial examination when historically the remedial actions, emergency or otherwise, of virtually every other federal agency are subject to judicial review. Certainly this is so when they result in the taking of property.

Consideration of the constitutional question presented here is especially important in that the Commission's

[11] Even if this exception to Section 701(a)(2) were not established, judicial review would still lie under Section 704 of the APA which allows judicial review when "there is no other adequate remedy in a court." Clearly, if the review argued for here is precluded, no judicial remedy is otherwise available to petitioner.

[12] The Court of Appeals could thus have affirmed the trial court's disposition of the case on the grounds that the Commission's *remedy* abridged constitutional rights notwithstanding its holding that review of the Commission's emergency determination—i.e., "reason to believe"—was foreclosed.

emergency powers affect hundreds of billions of dollars in property interests but have not yet been construed by this Court. Commodity markets are more active than ever before and their continued vitality is of international importance. The prospect of recurring controversy between the exchanges and the Commission over the exercise of emergency powers and the clash between that exercise and constitutional rights is high. Construction of the Act against the constitutional framework by this Court now will minimize the likelihood of controversy and facilitate proper operation of these markets.

III.

THE COMMISSION'S ACTION IS JUDICIALLY REVIEWABLE BECAUSE REPUGNANT TO THE COMMISSION'S STATUTORY AUTHORITY.

The Congress has given recognition to the national public interest served by the commodity futures markets, Act, Section 3, and the importance of their price determinative and hedging functions. By granting "emergency" powers to the Commission, Section 8a(9), the Congress charged it with the duty to "maintain or restore orderly trading in, or liquidation of" futures contracts. In Section 15, the Commission is required "to take the least anticompetitive means of achieving the objectives of (the) Act, as well as the policies and purposes of (the) Act in issuing any order * * *."

Action which substantially conflicts with these statutory mandates would be repugnant to the Commission's authority, and would be subject to judicial review notwithstanding any otherwise putative non-reviewability by

virtue of Section 701(a)(2) of the APA. See *Leedom* v. *Kyne,* 358 U.S. 184, 188 (1958); *Board of Trade* v. *CFTC, supra,* 605 F.2d at 1021, n. 6.

As noted in the argument to our preceding point, the substance of the challenged order, as distinguished from the Commission's emergency determination, would not only not have maintained or restored orderly trading in the contract but would have completely disrupted the market in March wheat by terminating trading. It thus would have destroyed the price determining function of that market in the crucial so called "nearby" or delivery month, a market which more than any other governs trading in cash wheat throughout the country as well as in the export trade. It would have thwarted the purposes of the Act, as we explained, by preventing the markets use by legitimate hedgers with the cash article in deliverable position who wished to hedge in the last days of the contract. It actually would have "fixed prices", i.e., at the arbitrary level of $3.67¾, rather than permitting prices to be set by competition in the pits. Further restraining competition and trade it removed the onus of making delivery from the shorts and conferred upon them a special competitive advantage. Also, as we noted, it forced all longs into a position of being obligated to accept delivery if such met the whim and fancy of the shorts.

Had the Commission purposely set out to violate the intent, purpose and policies of the Act it could not have done so more blatantly than it did by its order of March 16th. Happily for the trade, the public at large and the purposes of the Act, the Order was enjoined by the district court. And again we state that this Commission order,

repugnant in the extreme to its statutory authority and manifestely so to any person with commodity trading expertise, was issued with the Board of Trade's order in hand—an order which patently furthered the purposes of the Act in that: it maintained a price determining free market, available for hedging; promoted orderly trading in and liquidation of the contract, the latter by allowing trading for liquidation only and keeping the market open for the three days thus allowing offsetting of trades;[13] required shorts who did not elect to offset to fulfill the delivery requirements of their contracts; guaranteed the integrity of the contracts of longs who stood for delivery; and fixed no price.

Amici thus submit that the Court of Appeals should have looked beyond its formalistic approach to the Commission's "emergency" determination. It could have affirmed the district court's injunction against the statutorily repugnant order of the Commission, and should have done so in view of the overriding importance of the case and the need to decide the law governing this extraordinary provision of a new statute vitally affecting the national and international economy.

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[13] The substantial majority of all futures trades are closed out by offset, less than 5% of the open interest, on average, being closed out by delivery.

CONCLUSION

For the reasons set forth, the MidAmerica Commodity Exchange, Board of Trade of Kansas City, Missouri and the Minneapolis Grain Exchange respectfully submit that the requested writ be granted.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1247

BOARD OF TRADE OF THE CITY OF CHICAGO,

Petitioner,

—against—

COMMODITY FUTURES TRADING COMMISSION,

Respondent.

MOTION OF THE COFFEE, SUGAR & COCOA EXCHANGE, INC. FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*, AND BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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MOTION OF THE COFFEE, SUGAR & COCOA EXCHANGE, INC. FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITION FOR CERTIORARI

Pursuant to Rule 42 of the Rules of the Supreme Court of the United States, the Coffee, Sugar & Cocoa Exchange, Inc. (the "CS&C") respectfully moves this Court for leave to file the accompanying brief *amicus curiae* in support of the petition of the Board of Trade of the City of Chicago (the "Board of Trade") for the issuance of a writ of certiorari to the Court of Appeals for the Seventh Circuit. The Board of Trade consented to the CS&C's appearance as *amicus curiae,* but the respondent Commodity Futures Trading Commission (the "CFTC") has refused such consent.

The question presented by the petition is whether the Seventh Circuit erred when it held that emergency orders issued by the CFTC under Section 8a(9) of the Commodity Exchange Act, 7 U.S.C. §12a(9), to designated contract markets are immune from judicial review. The CS&C is one of only 10 commodity exchanges in the United States designated by the CFTC as contract markets for the trading of futures contracts and will be directly and adversely affected by the Seventh Circuit's decision. It has already been the recipient of one CFTC emergency order and could receive additional emergency orders in the future similar to that directed against the Board of Trade and sustained by the Seventh Circuit.

The CS&C is located in the City of New York and maintains markets for the trading of contracts for the future delivery of coffee, sugar and cocoa. A substantial percentage of the deliverable supply under these contracts is foreign-grown, and both domestic and foreign traders, dealers and users of these commodities are active participants in the CS&C's markets. While the CS&C is the only domestic exchange which has been designated as a contract market for futures trading in these commodities, similar contracts are traded in foreign markets. The CS&C believes that the Seventh Circuit's decision will have substantial and heretofore unconsidered impact upon domestic trading of contracts for the future delivery of international commodities. These considerations were neither adequately briefed by the parties nor addressed by the courts below.

WHEREFORE, the CS&C respectfully requests this Court to permit the CS&C to file the brief *amicus curiae* submitted herewith.

Respectfully submitted,

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Dated: New York, New York
April 11, 1980

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1247

BOARD OF TRADE OF THE CITY OF CHICAGO,

Petitioner,

—against—

COMMODITY FUTURES TRADING COMMISSION,

Respondent.

BRIEF *AMICUS CURIAE* OF THE COFFEE, SUGAR & COCOA EXCHANGE, INC. IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

This brief is submitted on behalf of the Coffee, Sugar & Cocoa Exchange, Inc. (the "CS&C"), as *amicus curiae,* in support of the petition for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit filed on February 12, 1980 by the Board of Trade of the City of Chicago (the "Board of Trade").

Preliminary Statement

The petition of the Board of Trade seeks review and reversal of the decision in *Board of Trade of the City of Chicago* v. *Commodity Futures Trading Commission,* 605 F.2d 1016 (7th Cir. 1979), in which the Seventh Circuit concluded that *any* determination by the Commodity Futures Trading Commission (the "CFTC") that a market

"emergency" exists, and *any* action taken by the CFTC predicated upon any such determination, are immune from judicial review. This extraordinary result would obtain even if the CFTC's actions were arbitrary and capricious or beyond its statutory authority.

Question Presented for Review

Whether a determination by the CFTC under Section 8a(9) of the Commodity Exchange Act, 7 U.S.C. § 12a(9), that an emergency exists in a contract market, and orders issued pursuant to that determination, are immune from judicial review.

Nature and Interest of the CS&C

By motion filed herewith, the CS&C seeks leave of this Court to enter its appearance as *amicus curiae* because it believes that the resolution of the question presented for review by the Board of Trade's petition will have substantial impact upon its own futures markets and international economic affairs generally.

The CS&C is the only domestic exchange on which futures contracts for three widely used international commodities—coffee, sugar and cocoa—can be traded in the United States. In 1979, aggregate trading volume on the CS&C was approximately 2,500,000 contracts.*

Although the particular CFTC emergency action which is the subject of the Board of Trade's petition was not directed at trading in any of the CS&C's contracts, the

* This total reflects: 1,825,000 sugar contracts covering 112,000 pounds each; 450,000 coffee contracts covering 37,500 pounds each; 230,000 cocoa contracts covering 30,000 pounds each; and 265 cocoa contracts covering 100 metric tons each.

rationale of the Seventh Circuit's decision, if accepted, might be applied to the CS&C's markets on some future occasion. Since January 1, 1977, the CS&C has itself taken emergency actions with respect to its markets on five different occasions. In one such instance, the CFTC took concomitant action. The CFTC has also taken emergency action in connection with other contract markets, including its recent suspension of grain futures trading following the President's embargo of grain shipments to the Soviet Union, and recently considered whether to take such action with respect to events affecting the silver futures markets. Thus, the question presented for review has continuing significance for all commodities markets.

Argument

The Seventh Circuit's decision is irreconcilable with the decisions of this Court relating to the availability of judicial review of administrative action. If permitted to stand, the Seventh Circuit's rationale would enable the CFTC to intervene in the international commodities markets, such as those maintained by the CS&C, *for any reason and in any manner*, without any opportunity for those directly aggrieved to obtain the basic safeguard of judicial review.

The economic significance of the Seventh Circuit's holding cannot be over-emphasized. In 1979, over 75 million contracts for the future delivery of both domestically and foreign produced goods were traded on United States contract markets by participants in these markets from around the world. Under the decision of the Seventh Circuit, the trading of any futures contract and the reliability of any hedging transaction would be captive to the unreviewable whim of the CFTC. The pertinent provisions of the Commodity Exchange Act, as amended (the "Act"), and its legislative history are barren of any indication that Con-

gress ever intended to confer such unfettered discretion upon the agency.

Under Section 8a(9) of the Act, the CFTC is empowered to

> "direct [a] contract market whenever it has *reason to believe* that an emergency exists, to take such action as, in the Commission's judgment, is *necessary to maintain or restore orderly trading in, or liquidation of, any futures contract*" (emphasis added).

The term "emergency" is defined in Section 8a(9) as

> "threatened or actual market manipulations and corners, [or] any act of the United States or a foreign government affecting a commodity or any other major market disturbance which prevents the market from accurately reflecting the forces of supply and demand for such commodity . . . ."

If this Court fails to repudiate the Seventh Circuit's view that CFTC directives to contract markets under Section 8a(9) are unreviewable, the CFTC will be free, at its pleasure, to intervene in the United States commodities markets, safe in the knowledge that its assertion of extraordinary powers cannot be contested in the courts for any reason. Such unchecked power could have devastating effects.

The CFTC emergency action here, had it become effective, would have required termination of all trading in the Board of Trade's March 1979 wheat futures contract and settlement of all outstanding contracts at an administratively decreed price. After the district court enjoined enforcement of the CFTC order, the market proceeded to liquidate on its own in an orderly fashion. Wall St. J., Mar. 22, 1979, at 38, col. 5. If the Seventh Circuit's

decision had been rendered earlier, this result would have been foreclosed. Because of the sequence of events, one cannot measure with precision the market impact that the CFTC's action would have had if it had become effective. According to the Seventh Circuit, however, the courts would have been unable to act regardless of the nature or extent of the ensuing impact.

The recent turmoil in the silver futures markets again focused international attention on the CFTC's emergency powers and illustrated the significance and timeliness of the issue presented for review by the Board of Trade's petition. Published reports indicated that the CFTC expressly considered whether to take emergency action during this crisis. *E.g.*, N.Y. Times, Mar. 29, 1980, at 1, col. 1 and 32, col. 3. Presumably, the CFTC could have decided to issue an order in the silver futures situation similar to the emergency action sought to be imposed on the Board of Trade in this case—termination of all trading and settlement of all outstanding silver futures contracts at a price set by the CFTC. Depending upon the price selected, such action could have rendered innumerable silver traders and several major futures commission merchants insolvent, and produced incalculable disruptions in the international commodities, equity and financial markets.

Under this Court's prior decisions, any such far reaching governmental action would be subject to judicial review under the Administrative Procedure Act, 5 U.S.C. §§ 701 *et seq.*, unless the CFTC could somehow satisfy the "heavy burden of overcoming the strong presumption that Congress did not mean to prohibit all judicial review of [the agency] decision." *Dunlop* v. *Bachowski*, 421 U.S. 560, 567 (1975). This burden must be met by "clear and convincing evidence." *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 141 (1967). The plain fact is that the Act's

legislative history fails to disclose an intent to preclude judicial review and cannot support the CFTC's attempt to rebut the "strong presumption" of reviewability.

No provision of the Act expressly precludes judicial review of CFTC orders under Section 8a(9). Rather than evidencing a Congressional desire to confer unreviewable authority upon the CFTC, the unmistakable message of the legislative history of Section 8a(9) is that Congress was deeply concerned that "the users of the futures markets will be reluctant to continue to depend on the markets if they feel that their contracts will be violated and abrogated by arbitrary governmental action." S. Rep. No. 93-1131, 93d Cong., 2d Sess. 25, *reprinted in* [1974] U.S. Code Cong. & Ad. News 5843, 5865-66. The Senate Committee Report contained the following explicit admonitions:

> "[T]he Commission is not to exert its extraordinary emergency powers except when it is clear that threatened or actual market manipulations and corners or other major market disturbances will in fact disrupt the markets and adversely affect the legitimate users of the markets.
>
> "Also, *the Commission must be particularly careful in dealing with commodities traded on international exchanges,*[*] *for it should not take any 'emergency' action that would drive trading out of exchanges in the United States." Id.* at 26, [1974] U.S. Code Cong. & Ad. News at 5866 (emphasis added).

Similarly, the Conference Committee made plain that an arbitrary judgment could not be the basis for Section 8a(9) action, but rather that such action must be premised

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* The CS&C is one of the "international exchanges" referred to by the Senate Committee.

upon "the careful exercise of expert and impartial judgment . . . ." H.R. Rep. No. 93-1383, 93d Cong., 2d Sess. 38, *reprinted in* [1974] U.S. Code Cong. & Ad. News 5894, 5900. Given such legislative pronouncements, it is inconceivable that in enacting Section 8a(9) Congress opted *sub silentio* for administrative absolutism.*

There has been no demonstration that Congress intended "to transfer its legislative power to the unbounded discretion" of the CFTC, *see FCC* v. *RCA Communications, Inc.*, 346 U.S. 86, 90 (1953), or to commit the exercise of vast emergency powers "'*entirely* to administrative discretion.'" *Morris* v. *Gressette*, 432 U.S. 491, 501 (1977), *quoting Barlow* v. *Collins*, 397 U.S. 159, 165 (1970) (emphasis added). Nor has this Court ever countenanced the peacetime assertion of unbridled authority over vital segments of our economic lives. The CS&C asks this Court to reassert its commitment to the well-established limits upon governmental authority and to reject the CFTC's claim to unreviewable power.

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* The fact that certain discretionary authority has been conferred upon the CFTC within its regulatory sphere does not mean that its exercise of such discretion is free from all legal constraints. Indeed, a contrary holding would effectively emasculate Section 706(2)(A) of the Administrative Procedure Act, 5 U.S.C. § 706(2)(A), which empowers a reviewing court to "hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, *an abuse of discretion,* or otherwise not in accordance with law" (emphasis added).

CONCLUSION

For the foregoing reasons, it is respectfully requested that the petition of the Board of Trade for a writ of certiorari to the Seventh Circuit be granted.

Respectfully submitted,

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